# Petition

81-521

No.

SEP 14 1981

ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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BECHTEL CORPORATION, BECHTEL INCORPORATED, BECHTEL POWER CORPORATION, BECHTEL INTERNATIONAL, INC. and BECHTEL INTERNATIONAL CORPORATION,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. May a court, consistent with due process, enter an antitrust "consent decree" when it is clear at the time of entry that the parties do not agree upon the substantive terms of the decree and that defendants object to entry?

2. Where an antitrust consent decree has been entered, over defendants' objection, without trial or consideration of the merits, and without compliance with the Antitrust Procedures and Penalties Act as required by law and the parties' stipulation, must defendants show some specific prejudice from such failure of compliance in order to have the decree set aside and to obtain their due process right to consideration of the merits?

3. In determining the public interest under the Antitrust Procedures and Penalties Act may the court treat as irrelevant such considerations as inconsistency between the proposed decree and recently enacted comprehensive federal legislation and regulations on the same subject, lack of any necessity for the decree, and disagreement between the parties as to the meaning of the decree?

## PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Ninth Circuit.* A number of other organizations filed comments and were permitted to appear as amici curiae in the United States District Court for the Northern District of California, which entered the decree in issue here.

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* Pursuant to Rule 28.1 of the Rules of this Court, petitioners set forth the following "listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates" of petitioners. Dillon, Read & Co., Inc. is a subsidiary of petitioner Bechtel Corporation. The parent corporation of petitioners Bechtel Incorporated and Bechtel Power Corporation is Bechtel Group, Inc. Convent Chemical Corp., Bechtel Communications Corporation, and BICA S.A. de C.V. are subsidiaries of petitioner Bechtel Incorporated. Bechtel Communications Corporation is a subsidiary of petitioner Bechtel Power Corporation. Bechtel Incorporated is the parent of petitioner Bechtel International, Inc. Bechtel Corporation, Bechtel Incorporated, Bechtel Power Corporation, Bechtel Civil & Minerals, Inc., Becon Construction Company, Inc., Bechtel Investments, Inc., Bechtel International Corporation and Dual Drilling Company are affiliates of each other.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION AND STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT: | |
| 1. Entry of the consent decree in this case without agreement of both parties conflicts with decisions of this Court and with due process of law.. | 6 |
| 2. The appellate court's acquiescence in gross government disregard of Antitrust Procedures and Penalties Act requirements establishes a dangerous precedent warranting this Court's review.... | 11 |
| 3. The holding of the court below that defendants must show specific prejudice from a violation of constitutional and statutory due process rights conflicts with holdings of this Court and requires review | 15 |
| 4. The court of appeals' misconstruction of the Antitrust Proecdures and Penalties Act "public interest" standard warrants Supreme Court review | 16 |
| CONCLUSION | 24 |

TABLE OF CONTENTS—Continued

APPENDIX (bound separately): Page

A. Opinion of U.S. Court of Appeals for the Ninth Circuit ..... A1
Judgment ..... A14

B. Memorandum of Decision of U.S. District Court for the Northern District of California ..... A15
Appendix: Final Judgment ..... A28
Entry of Judgment ..... A38

C. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976) ..... A39

D. Title II of the Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979) ..... A44

## TABLE OF AUTHORITIES


| *Cases* | Page |
|---|---|
| *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389 (1937) | 16 |
| *California Co-op. Canneries* v. *United States*, 299 F. 908 (D.C. Cir. 1924), *rev'd on other grounds*, 279 U.S. 553 (1929) | 21 |
| *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967) | 20, 21 |
| *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1931) | 23 |
| *Foster* v. *Mansfield, Coldwater & Lake Michigan Railroad*, 146 U.S. 88 (1892) | 23 |
| *Fuentes* v. *Shevin*, 407 U.S. 67 (1971) | 16 |
| *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) | 21 |
| *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944) | 22 |
| *Hughes* v. *United States*, 342 U.S. 353 (1952) | 16 |
| *International Association of Machinists* v. *Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981) | 20 |
| *Logue* v. *United States*, 412 U.S. 521 (1973) | 17 |
| *Malat* v. *Riddell*, 383 U.S. 569 (1966) | 17 |
| *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963) | 21 |
| *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425 (1868) | 8 |
| *Santobello* v. *New York*, 404 U.S. 257 (1971) | 15, 16 |
| *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972) | 20 |
| *Service* v. *Dulles*, 354 U.S. 363 (1957) | 15 |
| *Swift & Co.* v. *United States*, 276 U.S. 311 (1928) | 14 |
| *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961) | 20, 21 |
| *Towne* v. *Eisner*, 245 U.S. 418 (1918) | 7 |
| *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) | 22 |
| *United States* v. *Armour & Co.*, 402 U.S. 673 (1971) | 7, 15 |
| *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959) | 16 |
| *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424 (N.D. Ohio 1940) | 7 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *United States* v. *Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970) | 18 |
| *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975) | 21 |
| *United States* v. *Radio Corp. of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943) | 18 |
| *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) | 11 |
| *United States* v. *Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961) | 11 |
| *United States* v. *Terminal Railroad Association*, 236 U.S. 194 (1915) | 21 |
| *United States* v. *W.T. Grant Co.*, 345 U.S. 629 (1953) | 23 |
| *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964) | 7, 8 |
| *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954) | 15 |
| *United States ex rel. Clark* v. *Gramer*, 418 F.2d 692 (5th Cir. 1969) | 7 |
| *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) | 15 |
| *White* v. *Joyce*, 158 U.S. 128 (1895) | 7 |
| *Yellin* v. *United States*, 374 U.S. 109 (1963) | 15 |


*Statutes and Regulations*


| | |
|---|---|
| Fifth Amendment to the Constitution of the United States | *passim* |
| Antitrust Procedures & Penalties Act, 15 U.S.C. § 16 (b)-(h) (1976) | *passim* |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 1337(a) | 2 |
| The Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979) | *passim* |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 28 C.F.R. § 50.1 (1974) | 12 |
| 42 Fed. Reg. 48556 (1977) | 4 |
| 43 Fed. Reg. 3508 (1978), codified (as amended) at 15 C.F.R. Part 369 (1981) | 4 |
| 43 Fed. Reg. 12953 (1978) | 4 |
| *Other Authorities* | |
| 47 Am. Jur. 2d *Judgments* § 1083 (1969) | 7 |
| *Continuation of Authority For Regulation of Exports and Amending the Export Control Act of 1949: Hearings on H.R. 7105, H.R. 627, H.R. 4361 and similar bills, Before the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. (1965) | 19 |
| *Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976) | 19, 20 |
| *Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 95th Cong., 1st Sess. (1977) | 19 |
| *Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975) | 19 |
| H.R. Rep. No. 190, 95th Cong., 1st Sess. (1977) | 21, 22 |
| H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974) | 12, 22 |
| Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 Antitrust Bull. 277 (Summer 1978) | 12 |
| Ogden & Richards, *The Meaning of Meaning* (8th ed. 1948) | 7 |
| S. Rep. No. 104, 95th Cong., 1st Sess. (1977) | 19, 20 |
| S. Rep. No. 298, 93d Cong., 1st Sess. (1973) | 13 |

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### OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit which is sought to be reviewed is reported at 648 F.2d 660. It appears in the appendix at A1 to A13. The opinion of the District Court for the Northern District of California is reported at 1979-1 Trade Cas. (CCH) ¶ 62,430; the decree is reported at 1979-1 Trade Cas. (CCH) ¶ 62,429. The district court's opinion appears in the appendix at A15 to A27. The decree appears at A28 to A37.

### JURISDICTION

The opinion of the district court was filed January 5, 1979. *See* appendix at A15. The district court's judgment, dated January 22, 1979, was filed January 23,

1979. *See* appendix at A33. The opinion and judgment of the court of appeals were entered June 18, 1981. *See* appendix at A1 and A14. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The following constitutional provision and statutes are involved:

The Fifth Amendment to the Constitution of the United States, the pertinent text of which is as follows:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976), the text of which appears in the appendix at A39 to A43.

The Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979). The text of Title II of the Export Administration Amendments of 1977 appears in the appendix at A44 to A52.

## STATEMENT OF THE CASE

Petitioners (herein collectively referred to as "Bechtel") seek review of a decision affirming entry of an antitrust "consent decree" against them over their opposition. The district court had jurisdiction under 28 U.S.C. § 1337(a); however, the merits of the case have not been litigated or considered by any court. Bechtel objected to entry of the decree, before entry, because it was then evident the parties disagreed as to the substantive meaning of the decree, because the decree did not

meet the public interest standard of the Antitrust Procedures and Penalties Act ("APPA"),[1] and because the government had not complied with the requirements of the APPA and the stipulation between the parties.

As the Department of Justice ("Department") has stated, this is "a case of first impression in an area bereft of meaningful precedents, yet laced with political and economic uncertainty."[2] The case involves charges that Bechtel violated the antitrust laws in the course of doing business in Arab countries engaged in a boycott of Israeli goods and services. The decree established rules for doing business in such countries. It was the stated purpose of both parties in seeking to negotiate settlement to bring legal clarity and business certainty to the subject matter in issue, which would otherwise be murky for years. The Competitive Impact Statement ("CIS") filed by Bechtel at the time the stipulation for a decree was filed explicitly stated this,[3] and the Department stated that the decree represented its enforcement policy.[4]

After agreement upon wording of a proposed decree, on January 10, 1977 the parties filed a stipulation for its entry, conditioned on compliance with the APPA. Pursuant to the APPA, the proposed decree and the Department CIS were promptly published in the Federal Register on January 19, 1977. Thereafter no action was taken by the Department for more than 14 months, although the APPA required the Department to file the public's comments and its response within 60 days after such publication.

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[1] 15 U.S.C. § 16 (b)-(h) (1976); Appendix ("App.") A39-A43.

[2] Excerpt of Record (prepared in accordance with Rule 4(d) of the Rules of the U.S. Court of Appeals for the Ninth Circuit), hereinafter cited as "Rec.," 78.

[3] Rec. 57-62.

[4] Rec. 78.

On June 22, 1977, the Export Administration Amendments of 1977 ("EAA")[5] were signed into law, providing detailed statutory standards for trading with foreign countries engaged in international boycotts—the subject matter of the proposed decree. The Commerce Department published proposed comprehensive and detailed regulations implementing the EAA on September 23, 1977,[6] and final regulations on January 25, 1978.[7]

On March 28, 1978, the Department published the comments it had received concerning the proposed decree and its Response to Comments (none of which had previously been disclosed to Bechtel).[8] On March 31, 1978, Bechtel moved for a hearing prior to entry of the proposed decree because the Department's Response, for the first time, reflected an interpretation completely at variance with Bechtel's understanding of the decree. Pursuant to agreement of the parties that the proposed decree would not be entered without a hearing, Bechtel withdrew its motion, and the Department filed a motion for entry of judgment on May 15, 1978.[9] A number of parties filed memoranda and appeared as amici curiae.[10] On September 11, 1978, the district court held a hearing on the motion for entry of judgment.

In pleadings and oral argument Bechtel urged that the proposed decree not be entered for several reasons. First,

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[5] Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979); App. A44-A52.

[6] 42 Fed. Reg. 48556 (1977).

[7] 43 Fed. Reg. 3508 (1978), codified (as amended) at 15 C.F.R. Part 369 (1981).

[8] 43 Fed. Reg. 12953 (1978); Rec. 65, 219.

[9] Rec. 219.

[10] Rec. 220.

the response of the Department disclosed that the parties had not agreed upon the meaning of the proposed decree and thus there was no consent. Second, the Department's failure to comply with the requirements of the APPA involved violation of both the statute and a condition of the stipulation. Third, the Department's statements that the proposed decree need not be harmonized with the EAA nullified a vital section of the decree and the agreement upon which Bechtel had entered into the stipulation. Fourth, the conflict between the proposed decree, the EAA and the Commerce Department implementing regulations engendered confusion as to United States government policy; and for this and other reasons the decree as proposed was not in the public interest.

On January 5, 1979, the district court filed its decision.[11] The court held that its consideration was limited to determining "whether the relief provided for in the Proposed Judgment is adequate to remedy the allegations of antitrust violation as set out in the Complaint." [12] The court said that because the language of the proposed decree had not been altered, the meaning ascribed to it by the Department did not give Bechtel the right to withdraw its earlier "consent"; that the Department had not failed to comply with the APPA; and that the decree adequately met the allegations of the complaint.[13] The decree was entered on January 22, 1979.[14] Bechtel appealed.

The court of appeals affirmed the district court on June 18, 1981.[15] The court of appeals held that the

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[11] Rec. 193; App. A15.

[12] Rec. 197; App. A18-A19.

[13] Rec. 197-203, 204-05; App. A19-A25, A26-A27.

[14] Rec. 216; App. A38. The entry of judgment was filed January 23, 1979. *Id.*

[15] *United States* v. *Bechtel Corp.*, 648 F.2d 660 (9th Cir. 1981); App. A1.

Department had failed to comply with the requirements of the APPA, but that "strict technical compliance with the APPA" was not necessary to entry of the decree.[16] The court reasoned that because no words of the decree had been altered it was proper for the district court to enter the decree despite disagreement as to the meaning of those words.[17] The court of appeals held that the district court applied the proper standard of "public interest" under the APPA and that uncertainty about the meaning of the decree and "any conflict between the EAA and the decree is not relevant to a determination of the public interest."[18] This petition followed.

## REASONS FOR GRANTING THE WRIT

**1. Entry of the consent decree in this case without agreement of both parties conflicts with decisions of this Court and with due process of law.**

When the decree in this case was entered, it was apparent that there was no agreement between the parties upon substantive terms. There was no disagreement over the words of the decree, but their meaning and effect were hotly disputed. Despite absence of mutual consent, the district court entered the decree and deprived Bechtel of its constitutional right to trial.

The court of appeals affirmed entry of the decree, stating "[t]he language of the decree entered by the district court is precisely that to which Bechtel agreed."[19] The court ignored the fact that "[w]ords, as everyone now knows, 'mean' nothing by themselves . . . . It is only

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[16] 648 F.2d at 664; App. A7.

[17] *Id.* at 665; App. A9.

[18] *Id.* at 666; App. A12.

[19] *Id.* at 665; App. A9.

when a thinker makes use of them that they stand for anything, or, in one sense have 'meaning.' They are instruments." [20] This Court, speaking through Justice Holmes, long ago acknowledged this, saying: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [21]

The entry of the decree conflicts with this Court's decisions in *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964) and *White* v. *Joyce*, 158 U.S. 128, 147-49 (1895), which held that a judgment by consent may not be entered without the actual agreement of all parties. *Accord, United States ex rel. Clark* v. *Gramer*, 418 F.2d 692 (5th Cir. 1969). The mutual consent requirement is but an aspect of the fundamental Fifth Amendment right to trial. Since a consent decree is not based on adjudication of the merits, its entry without a party's agreement violates due process. *See United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971); *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio 1940).

The lower courts failed to recognize that a dispute over the meaning of a decree at or prior to the time of entry evidences lack of consent. Hornbook law holds that it is

> insufficient to support a judgment by consent that a party's consent thereto may have been given at some previous time; actual consent must exist at the very moment the court undertakes to make the agreement the judgment of the court. [47 Am. Jur. 2d *Judgments* § 1083 (1969) (footnotes omitted).]

The necessity of consent at the time of entry is an implicit corollary of this Court's holdings that a consent

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[20] Ogden & Richards, *The Meaning of Meaning* (8th ed. 1948) at 9-10.

[21] *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918).

judgment may not be entered without consent. Just as "a bona fide disagreement concerning *substantive* items of relief" made entry of a so-called consent decree improper in *United States* v. *Ward Baking Co.*, *supra*, 376 U.S. at 334 (emphasis added), so here the significant substantive disagreements that emerged after execution of the stipulation and prior to entry of the decree preclude entry.

Common sense and fundamental fairness compel reversal of the judgment below. The purpose of a consent decree is to resolve, not foment, disputes.[22] The court of appeals' decision to the contrary, if allowed to stand, will foster considerable mischief in the lower courts and discourage the use of consent decrees as a means of resolving disputes.

The district court erroneously thought that Bechtel was claiming for all defendants a right of unilateral withdrawal from settlement stipulations.[23] Far from asserting any general right of a stipulating defendant to renege prior to entry, Bechtel contended below that entirely new circumstances, namely the late-filed Department Response showing unexpected disagreements between the parties on the meaning of the decree, made entry inequitable and a violation of due process in the circumstances of this case. The court of appeals, in turn, ruled that any argument over conflicting interpretations of the decree was "premature" prior to entry.[24] The court simply disregarded the fundamental nature of the parties' substantive disagreements on matters critical to Bechtel's acceptance of the stipulation.

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[22] *See Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 432 (1868) ("[A court of equity] disposes of a case so as to end litigation, not to foster it. . . .").

[23] Rec. 202-03; App. A24-A25.

[24] 648 F.2d at 665; App. A9.

The parties differed on the meaning of the decree in crucial respects. For example, Bechtel believed that the decree had a narrow territorial reach, and the Department's 1977 CIS explicitly confirmed that.[25] The Department's 1978 Response and related pleadings contradicted its own CIS and Bechtel's understanding by insisting that the decree broadly applied to conduct on foreign soil that has "effects" on U.S. commerce.[26]

Also, Bechtel understood that, pursuant to Section VI,[27] the decree would be harmonized with any subsequent boycott legislation (particularly the EAA then pending in the Congress). This was to effectuate the parties' original central objective of one clear and certain set of rules governing trade with foreign countries engaged in inter-

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[25] Speaking generally about the alleged violation and the decree, the CIS said the Department's concern was "implementation in the United States," that is, within "sovereign [U.S.] territory." Rec. 32. The CIS expressly acknowledged that "Arab states have a valid claim to control significant commercial conduct within their sovereign territories. . . ." *Id.* More specifically, the CIS added that "Section IV(A) prevents defendants from taking [certain] steps . . . in the United States, *but not in an Arab League Country.*" Rec. 35 (emphasis added). In discussing Section IV(B), the Department made clear that the provision was concerned with acts of "implementation in the United States beyond the power of Arab sovereign compulsion." Rec. 36.

[26] Rec. 72; *see* Rec. 75.

[27] Section VI states in full:

> If any Act of Congress is enacted or the United States becomes a party to any International Agreement, either of which creates rights or benefits with respect to business in Arab League Countries which Persons not subject to the provisions of this or a similar Final Judgment are entitled to exercise or enjoy consistent with the antitrust laws, then, upon application to the Court by any defendant, the terms set forth herein shall be deleted or modified as in the Court's determination is necessary to permit said defendant to exercise or enjoy such rights or benefits.

national boycotts.[28] In its 1978 Response, the Department asserted that the EAA and the implementing regulations "authorize . . . a plethora of boycott-implementing activities which would not be permitted under the decree." [29] But the Department insisted nonetheless that the EAA was not the kind of statute contemplated by Section VI of the decree.[30] Under the Department's startling interpretation of Section VI, Bechtel would be denied the modification of the decree for which it had bargained. Bechtel would be exposed to contempt citations for activity consistent with the EAA but contrary to the decree, whereas its competitors would have no such disability.[31]

Instead of viewing the parties' basic disagreements on these and other matters as showing lack of consent to the decree, the court of appeals acted as if it were being asked to modify a decree whose meaning had already been the subject of mutual consent. The court treated pre-entry interpretation disputes as no different from post-entry disputes. This approach incorrectly and unfairly placed Bechtel in the same position as a consenting

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[28] *See* p. 3 and footnotes 3 & 4, *supra*.

[29] Rec. 83 n. 14.

[30] The district court pleadings with respect to this issue demonstrate that, at the time the decree was entered, the parties differed fundamentally in their understanding of the meaning of at least three terms in Section VI: "create," "rights or benefits," and "consistent with the antitrust laws." *See* Rec. 77-78, 104-11, 147-50, 179-83; Bechtel's opening court of appeals brief at 19-21 and reply brief at 1-7.

[31] Bechtel also understood (and believed the Department agreed) that the decree did not address or prohibit negative certificates of origin. However, the Department asserted in its 1978 Response that the decree "clearly proscribes such conduct" when used to implement a boycott (Rec. 76), although it could cite no provision expressly stating such proscription. Other examples of the parties' differing interpretations of the decree are described in Bechtel's opening brief to the court of appeals at 16-22.

party who, long after consent and judgment, seeks modification of a decree on grounds of changed circumstances or mistake. The latter must meet a "heavy burden" of demonstrating "grievous harm" to warrant modification of the decree. *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932); *United States* v. *Swift & Co.*, 189 F. Supp. 885, 906-07 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961). But since Bechtel did not knowingly and willingly consent to be so bound, the court of appeals' decision directly conflicts with this Court's consent decree decisions and should be reviewed.

**2. The appellate court's acquiescence in gross government disregard of Antitrust Procedures and Penalties Act requirements establishes a dangerous precedent warranting this Court's review.**

The court of appeals correctly ruled that the Department violated "the plain language" of the APPA by filing its response to public comments one year after the APPA's 60-day deadline.[32] Yet the court implicitly acquiesced by holding that compliance with the APPA is not a prerequisite to entry of a decree even where (as here) the parties' stipulation explicitly required compliance.[33] The court suggested no alternative means of compelling the Department to obey the law—even in the face of the Department's affidavit admitting that it consistently ignores the 60-day deadline.[34] This anomalous ruling in a circuit that has many antitrust cases warrants

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[32] 648 F.2d at 664; App. A7.

[33] The Department of Justice itself conceded that compliance with the APPA was a condition precedent to entry of the decree. Reporter's Transcript of Proceedings Before Hon. William A. Ingram, Judge (9/11/78) at 7, lines 17-22.

[34] Rec. 191-92.

immediate Supreme Court review. Review now is especially desirable because the APPA governs the approximately 80% of government antitrust cases which result in consent settlements,[35] the issue here is clearly presented, and Department practice is still developing.

Contrary to the court below, the "structure of the statute and its legislative history" show that the 60-day deadline *was* "established to prevent open-ended scrutiny of a proposed consent decree."[36] Section 16(b) of the APPA provides that public comments and the United States' response thereto must be filed and published "within" a "sixty-day period." Section 16(d) reiterates that "[d]uring the 60-day period" the United States "shall receive and consider" the comments and that "[a]t the close of the period . . . the United States shall file . . . a response to such comments." Section 16(d) adds that "the United States may request and the court may grant" additional time; but nowhere does it authorize the United States to delay for a year or for any extra period without prior court permission. The legislative history of the APPA demonstrates that Congress meant what it said. The House Report stated that "the United States is *required* to publish" its response during the 60-day period.[37] The Senate Report explicitly stated that "*under no circumstances* would the period required for

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[35] Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 Antitrust Bull. 277 (Summer 1978); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 6 (1974).

[36] 648 F.2d at 664; App. A7. Prior to the enactment of the APPA, there was a Department regulation requiring antitrust consent decrees to be filed 30 days before entry but providing no deadline for comments. 28 C.F.R. § 50.1 (1974).

[37] H.R. Rep. No. 1463, *supra*, at 7 (emphasis added).

the submission of any comments and the government's response be longer than sixty days." [38]

The court of appeals' holding nullifies the language of the APPA and the Congressional reports. If an antitrust defendant cannot get the court to refuse entry of the decree in the case of government noncompliance with the statutory terms, then the Department will continue to disregard the statute at will, as it has been doing. This Court should not permit a government department to repeal an Act of Congress.

The court of appeals' ruling will wreak havoc with the consent decree process. Most consent decrees expire by their own terms a set period after entry of judgment. If the ruling here stands, many defendants will be unwilling to agree to such a settlement if they can no longer depend on prompt commencement of the governing period. In the instant case, expiration after a 20-year period was an integral part of the negotiated package.[39] The stipulation's requirement that the Department comply with the APPA ensured that the Department could not delay commencement and expiration of that period. The court of appeals wrongly concluded that noncompliance with the APPA "did not go to the essence of the stipulation." [40]

The court below also erred in stating that the APPA default did not prejudice Bechtel. The court of appeals reasoned that "Bechtel has not shown how the timely filing of the government's response to public comments would have avoided [the] conflict" between the Justice

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[38] S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973) (emphasis added).

[39] *See* Section X of the decree (Rec. 214; App. A37) and Department CIS (Rec. 54). Bechtel did not ask for a stay pending appeal because it did not wish to prolong further the period of the decree.

[40] 648 F.2d at 664; App. A8.

and Commerce Departments.[41] If the Justice Department response had been filed timely, there would have been no EAA and no Commerce Department regulations in existence at that time. Consequently, the issues addressed in the Department's response might never have arisen, and, if they had arisen, would have been addressed in entirely different circumstances in which Bechtel might at least have had an opportunity to be heard before the Department position was determined. Moreover, had the decree been entered promptly, the EAA would have been enacted subsequent to the decree—a change in circumstance providing grounds for modification of the decree. Since the EAA preceded entry of the decree, Bechtel may be disadvantaged if it seeks to use passage of the EAA as a change in circumstances warranting modification of the decree under the rule of *Swift & Co.* v. *United States*, 276 U.S. 311 (1928).

The Department's noncompliance also prejudiced Bechtel and the amici curiae that supported Bechtel in the district court in making their case to Congress. Congress believed the EAA would resolve the uncertainties inherent in the case against Bechtel. Had the concept of dual standards been announced before the EAA was enacted, Congress would have had an opportunity to include even more explicit language absolutely ensuring the Congressional objective that there be but one set of guidelines for trade with the Middle East.[42]

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[41] *Id.*

[42] Congressional intent on this point is illuminated by the section of the EAA preempting all state and local laws and regulations relating to the same subject. Section 205 of the Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8(c) of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. § 2407(c) (Supp. III 1979); App. A52.

**3. The holding of the court below that defendants must show specific prejudice from a violation of constitutional and statutory due process rights conflicts with holdings of this Court and requires review.**

The court below erroneously viewed government noncompliance with the APPA as harmless error that did not prejudice Bechtel. This Court, when confronted with government violation of procedures set forth in statute or rule, has regularly invalidated the government action without requiring a demonstration that the violation substantively prejudiced the affected individuals. *See, e.g., Yellin* v. *United States*, 374 U.S. 109, 120-121 (1963); *Vitarelli* v. *Seaton*, 359 U.S. 535, 545 (1959); *Service* v. *Dulles*, 354 U.S. 363, 388-89 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954). Implicit in these decisions, and in the Due Process Clause, is the principle that procedural requirements are binding on the government whether or not compliance will determine the outcome of a proceeding. The Due Process Clause is a guarantor of procedural regularity independent of result. The court of appeals' disregard of this principle is an open invitation for the Department to dispense with congressionally mandated procedures whenever the Department believes that the impact will not be outcome dispositive.

The court of appeals' decision also is an invitation for the Department to break agreements with defendants. This Court has said that when "the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, *the conditions upon which he has given that waiver must be respected.*" *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (emphasis added). In *Santobello* v. *New York*, 404 U.S. 257 (1971), the government induced defendant to plead guilty by promising to abstain from any sentencing recommendation, and then broke that promise. This Court vacated the judgment, stating that when the government makes a promise to induce a de-

fendant to waive his right to trial, "such promise must be fulfilled." *Id.* at 262. The Court did not find it necessary to decide whether the violation of the bargain prejudiced the defendant. In the instant case, the stipulation waived the right to trial on the express condition that the Department fully comply with the APPA. The Department's default, like that in *Santobello*, requires vindication without any need to show prejudice.

Just as violation of the APPA was itself enough to bar entry of the decree, the disagreement between the parties concerning the meaning of the decree should have precluded entry without any specific showing of prejudice. Imposition of the decree in the face of such dispute was a denial of Bechtel's right to trial. It was entry of a "consent" decree without consent. Waiver of a right as fundamental as the right to trial may not be presumed. *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1971); *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). The court of appeals' position that any defects in consent at the time of entry can be cured later in a contempt or modification proceeding ignores the basic meaning of due process. Under our form of government a defendant is not subjected to injunctions and contempt proceedings without a hearing on the merits or consent. *See United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes* v. *United States*, 342 U.S. 353, 357-58 (1952).

**4. The court of appeals' misconstruction of the Antitrust Procedures and Penalties Act "public interest" standard warrants Supreme Court review.**

The court of appeals' unduly limited and confused conception of the judge's APPA "public interest" responsibility raises a question of great importance that should be reviewed in order to avert serious prejudice to the antitrust settlement process. Authoritative construction by this Court of the APPA "public interest" standard is

timely now. As mentioned earlier, the APPA settlement process is employed in approximately 80% of all government antitrust cases and, presumably, is at least considered in most of the remainder.[43] The trial judge's exercise of "public interest" review of a consent decree is central to the statutory scheme. Despite the statute's frequent use, this Court is unlikely to have a better opportunity to provide needed guidance to the lower courts and to correct the confusion engendered by the court of appeals.

The court of appeals seemingly held that the district judge's self-styled "guidelines" governing the scope of public interest inquiry—*i.e.*, "whether the relief provided for in the proposed judgment was adequate to remedy the antitrust violations alleged in the complaint"—were too narrow.[44] At the same time the court said the judge had "considered" matters outside his "guidelines" and that this rendered the public interest inquiry "appropriate in scope."[45] Yet, there is no indication that the district judge abandoned his "guidelines" or "considered" other matters to be relevant. The court of appeals disregarded the cardinal rule that when an inferior court has applied an improper standard, or failed to consider matters relevant to its decision, remand under the proper standard is the correct course.[46]

The APPA specifies two distinct areas to be considered in determining the public interest: the "competitive impact of [the] judgment" and the "impact of entry of [the] judgment upon the public generally." 15 U.S.C. § 16(e). The courts below essentially ignored the second category.

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[43] *See* footnote 35, *supra*.

[44] 648 F.2d at 665-66; App. A10-A11.

[45] *Id.* at 666; App. A11.

[46] *Malat* v. *Riddell*, 383 U.S. 569, 572 (1966); *Logue* v. *United States*, 412 U.S. 521, 532-33 (1973).

The court of appeals correctly said that a trial judge should steer between a cut and dried examination of whether the proposed judgment adequately remedied the alleged antitrust violations (*i.e.*, the district court's approach) and "an unrestricted evaluation of what relief would best serve the public." [47] The court even appeared, at first, to accept the view that "public interest" scrutiny should include some consideration of policy factors beyond narrow Sherman Act enforcement concerns.[48] But the court did not identify any such factors or apply consideration of any such factors to this case. This eviscerated the APPA and departed from precedent.

Entry of an antitrust consent decree has never been merely the ministerial authentication of a private agreement. It is a "judicial act" requiring an "independent" public interest determination, *United States* v. *Radio Corp. of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943), consistent with the court's traditionally broad equitable responsibilities. For instance, the court in *United States* v. *Ling-Temco-Vought, Inc.*, 315 F. Supp. 1301 (W.D. Pa. 1970), was obliged to consider aspects of the public interest extending beyond the complaint's strict Sherman Act concerns. The court conditioned a divestiture decree on the parties protecting employees threatened with loss of pension rights.

The appellate tribunal disregarded long-standing precedent by holding that the decree's conflict with the EAA and dispute about the meaning of and need for the

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[47] 648 F.2d at 666; App. A11.

[48] The court said that the Attorney General "in the first instance" must consider "competing social and political interests affected by a proposed antitrust consent decree," with the court's role in the second instance being one of "insuring that the government has not breached its duty to the public. . . ." *Id.*

decree were "not relevant" to the public interest judgment.[49]

Certainly it is not indulgence in the "unrestricted evaluation" feared by the court of appeals to refer to statutes other than the Sherman Act as embodying Congress' conception of the public interest. Advancement of United States interests in continued Middle East trade without promoting the Arab boycott was a problem that received close and continuous attention from Congress and the Executive Branch over many years.[50] The EAA represents the outcome of painstaking efforts to establish a clear, universal set of rules for trade with the Middle East. Secretary of State Cyrus Vance, describing the success of those efforts, stated that the EAA reconciles diverse interests and "minimizes uncertainty and risk for the U.S. firms." [51] Aware of the doubtful application of the antitrust laws to the Bechtel case,[52]

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[49] 648 F.2d at 666; App. A12.

[50] *See, e.g., Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 94th Cong., 2d Sess. (1976); *Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. (1975); *Continuation of Authority For Regulation of Exports and Amending the Export Control Act of 1949: Hearings on H.R. 7105, H.R. 627, H.R. 4361 and similar bills, Before the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. (1965).

[51] *Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 315 (1977).

[52] The Report of the Senate Committee on Banking, Housing and Urban Affairs on the EAA cited Justice Department testimony identifying the "serious impediments" to application of the antitrust laws to the Arab boycott. S. Rep. No. 104, 95th Cong., 1st Sess. 19 (1977). Similarly, Congressman Koch of New York urged that the EAA be enacted because "substantial doubts exist among antitrust lawyers that the government will prevail in *Bechtel* on

Congress strove to ensure that the EAA would provide "[p]recision and clarity," so that "those people covered by the bill can determine with the highest possible degree of certainty whether and how a given transaction or activity is governed by the law."[53] After all, citizens should be able to deal definitively with one United States government rather than a confederation of rivalrous agencies continuously second-guessing each other. *S&E Contractors, Inc.* v. *United States*, 406 U.S. 1 (1972), particularly in matters affecting foreign relations.[54]

A trial court abuses its discretion by declining to modify a consent decree that conflicts with a subsequently enacted statute. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 650-51 (1961). This Court will reject consent decrees which conflict with statutes or with its decisions. *Id.*; *Cascade Natural Gas Corp.* v. *El Paso Nat-*

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the antitrust theory." *Extension of the Export Administration Act of 1969: Hearings Before the House Comm. on International Relations*, 94th Cong., 2d Sess. 192 (1976). The EAA, he said, would "obviate the need for litigation of doubtful outcome." *Id.*

Thus, when Congress stated in the EAA that it did not "supersede or limit" the operation of the antitrust laws, the precaution was simply designed to permit applications of the antitrust laws not involved in this case. *See* that portion of the section of the EAA adding a new Section 4A(a)(4) to the Export Administration Act of 1969. Section 201(a) of the Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8(a)(4) of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. § 2407(a)(4) (Supp. III 1979); App. A48. Congress recognized, as petitioners do, that matters not addressed by the EAA might well be antitrust violations.

[53] S. Rep. No. 104, *supra*, at 37.

[54] *See International Ass'n of Machinists* v. *Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), where another panel of the same court of appeals said: "To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy."

*ural Gas Co.*, 386 U.S. 129, 136 (1967). A consent decree should not be entered "if its effect is to safeguard one public interest by the destruction of another." *California Co-op. Canneries* v. *United States*, 299 F. 908, 914 (D.C. Cir. 1924), *rev'd on other grounds*, 279 U.S. 553 (1929); *see United States* v. *Terminal Railroad Association*, 236 U.S. 194, 205 (1915). In particular, a court must be alert to avoid any clash between its antitrust decrees and federal regulatory statutes. *United States* v. *Terminal Railroad Association*, *supra*, 236 U.S. at 208-09. It follows, therefore, that the conflict here between the decree and the EAA *is* highly relevant to the APPA public interest evaluation.

A consent decree, of course, establishes no antitrust violation; and obviously the decree itself is not an antitrust law. Due to changed circumstances and the Department's refusal to harmonize the decree with the EAA, the judgment here—not the antitrust laws, whose application has never been established—is on a collision course with another regulatory scheme. This Court, which has not permitted the Sherman Act to interfere in the effective functioning of a comprehensive federal regulatory scheme,[55] *a fortiori* should not permit a consent judgment, based on no proven violation, to do so. *System Federation No. 91* v. *Wright*, *supra*.[56]

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[55] *See, e.g., Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (1963); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

[56] The Department may contend that there is no direct conflict between the decree and the EAA because the EAA simply permits and does not require Bechtel to do certain things which the decree prohibits. However, in carefully crafting the EAA, Congress made an *affirmative* judgment that certain practices, despite their potential competitive or other consequences, must be allowed in order to avoid unduly inhibiting U.S. international business and infringing foreign nations' sovereignty. H.R. Rep. No. 190, 95th Cong., 1st

The precedential damage caused by the appellate court's refusal to consider the public interest ramifications of the decree's conflict with comprehensive federal legislation was compounded by the court's statement that lack of necessity for a decree is similarly irrelevant to the public interest under the APPA.[57] It has long been the traditional responsibility of a court of equity to determine if a proposed decree is necessary, *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944), and, particularly in the case of an antitrust decree, to determine whether intervening federal legislation has eliminated any necessity for entering such a decree, *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 446-47 (2d Cir. 1945). Designed to eliminate "judicial rubber stamping" of Justice Department consent decrees,[58] the APPA if anything reinvigorated the judiciary's traditional equitable responsibility to determine whether a proposed decree is necessary to the public interest.

The EAA provides a comprehensive solution to a wide range of problems involved in *any* foreign boycott of a friendly nation. Recourse to the consent decree process to provide guidance in a disputed area of law might have been appropriate before there was specific legislation on point. At the time of entry here, however, the proposed judgment was already superfluous because of the EAA enactment and Bechtel's stated willingness to comply fully with the EAA. A superfluous decree should not be

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Sess. 25 (1977). As Congress recognized, many of the activities permitted by the EAA are mandated by foreign law. Consequently, compliance with the decree as construed by the Department will place Bechtel either in violation of the laws of foreign sovereigns or will inhibit the very international business which Congress, in its EAA exceptions, affirmatively intended to preserve and promote.

[57] 648 F.2d at 666; App. A12.

[58] H.R. Rep. No. 1463, *supra*, at 8, 12.

entered, because "[a] court of equity is not called upon to do a vain thing." *Foster* v. *Mansfield, Coldwater & Lake Michigan Railroad*, 146 U.S. 88, 101 (1892). Equity prohibits issuance of an injunction except where there is an actual threat of future injury. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 674 (1931). Here it is undisputed that Bechtel has complied and will continue to comply fully with the recent and comprehensive statute and regulations on foreign boycotts.

The court of appeals also set a bad precedent when it concluded that the parties' dispute, at the time of entry, as to meaning of the decree is irrelevant to the APPA public interest evaluation.[59] Such a proposition demands Supreme Court review before further damage occurs in the lower courts. The idea that ambiguity in terms or defects in consent at the time of entry may be cured only in a subsequent contempt or modification proceeding defies common sense and the plain words of the APPA. The APPA calls upon the courts to engage in a full public interest evaluation "[*b*]*efore* entering any consent judgment. . . ." 15 U.S.C.A. § 16(e) (emphasis added). To postpone clarity and mutual understanding not only robs the parties of their due process rights (see Point 1 above), but prevents the public—the chief intended beneficiaries of the APPA—from knowing what the decree will and will not do.[60]

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[59] 648 F.2d at 666; App. A12.

[60] A major purpose of the APPA was "to foreclose future disputes" regarding the meaning of a decree by fully explicating the decree prior to entry. *See* H.R. Rep. No. 1463, *supra*, at 8.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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September 14, 1981

# Appendix

81-521

No.

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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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BECHTEL CORPORATION, BECHTEL INCORPORATED,
BECHTEL POWER CORPORATION,
BECHTEL INTERNATIONAL, INC. and
BECHTEL INTERNATIONAL CORPORATION,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## TABLE OF CONTENTS


| | Page |
|---|---|
| A. Opinion of U.S. Court of Appeals for the Ninth Circuit | A1 |
| Judgment | A14 |
| B. Memorandum of Decision of U.S. District Court for the Northern District of California | A15 |
| Appendix: Final Judgment | A28 |
| Entry of Judgment | A38 |
| C. Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976) | A39 |
| D. Title II of the Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), re-enacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979) | A44 |

## APPENDIX A

**Opinion of U.S. Court of Appeals for the Ninth Circuit; Judgment**

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UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 79-4194

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.

BECHTEL CORPORATION, BECHTEL INCORPORATED, BECHTEL POWER CORPORATION, BECHTEL INTERNATIONAL, INC. and BECHTEL INTERNATIONAL CORPORATION,
*Defendants-Appellants.*

Argued and Submitted Jan. 14, 1981

Decided June 18, 1981

Before SKOPIL and FLETCHER, Circuit Judges, and EAST,* District Judge.

SKOPIL, Circuit Judge:

### INTRODUCTION

Bechtel Corporation, Bechtel Incorporated, and certain of their subsidiaries ("Bechtel") appeal the entry of a consent judgment. The decree was entered in an antitrust action based on Bechtel's alleged participation in the Arab boycott of Israel. We conclude that the acts of the government, taken after a stipulation consenting to the

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

judgment was filed, do not require that Bechtel be relieved from its consent. We further find that the trial court did not err in determining that the decree is in the public interest. We affirm.

## BACKGROUND AND PROCEEDINGS BELOW

In January 1976 the United States filed a civil action against Bechtel asserting violations of section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint described the Arab boycott, whereby Arab League countries refuse to engage in commercial relations with those who engage in commerce with Israel. It alleged that Bechtel combined, conspired, and agreed with others to participate in the boycott. The government asserted that this activity restrained trade in violation of the antitrust laws, and requested declaratory and injunctive relief.

Bechtel denied the complaint's material allegations and raised eleven defenses, including estoppel, inapplicability of the antitrust laws, government sanction, sovereign compulsion, act of state, non-justiciable controversy, national interest, and failure to state a cause of action.

In January 1977 the parties proposed a consent decree and filed it with the district court, along with the competitive impact statement required by the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16. The parties also filed a stipulation. The stipulation provided that the proposed judgment could be entered

> "upon the motion of either party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. §§ 16(b) *et seq.*) and without further notice to any party or other proceedings, provided that plaintiff [the government] has not withdrawn its consent which it may do at any time

before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court."

On January 19, 1977 the proposed decree and the government's competitive impact statement were published in the Federal Register and certain newspapers. In the following sixty days the government received comments on the proposed decree from the public. The sixty-day period for public comment, provided by 15 U.S.C. § 16(d), ended on April 3, 1977.

In June 1977 Congress passed the Export Administration Amendments ("EAA") regarding foreign boycotts. 50 U.S.C.App. §§ 2401-13. Department of Commerce regulations interpreting the new law were drafted, published and finally issued in January 1978.

On March 24, 1978 the government published its response to the comments received from the public on the proposed consent decree. On May 10, 1978 it moved for entry of the proposed final judgment.

On June 30, 1978 Bechtel filed its opposition to the entry of the decree. Bechtel argued that: (1) there was no basis for entering the judgment because the government had violated the stipulation by failing to comply with the APPA; (2) Bechtel's consent was vitiated by the new interpretations the government was applying to the decree; and (3) entry of the decree was no longer in the public interest because of the conflicting interpretations and the intervening passage of the Export Administration Amendments.

The district court concluded that the United States had not violated the APPA, or at least that Bechtel had not shown sufficient prejudice from any such violation to nullify its consent. It also determined that the interpretations of the proposed judgment the government had

advanced in its response to public comments did not repudiate the agreement or amount to a withdrawal of consent. Further, the court found the EAA no bar to entry of the decree. Finally, the district court found the proposed judgment in the public interest, and ordered it entered. Bechtel appealed.

We must decide: (1) whether the district court had jurisdiction to enter the decree; (2) whether the government violated the provisions of the APPA; (3) if so, whether the violation vitiated the stipulation of consent; (4) whether the interpretations of the decree presented in the government's response to public comments amounted to a repudiation by the government or relieved Bechtel of its consent; (5) what factors must be considered in determining whether the entry of a consent judgment in an antitrust case is in the public interest; and (6) whether entry of this decree is in the public interest.

## DISCUSSION

Decrees entered by consent may be reviewed on appeal where there is a claim of lack of actual consent or a lack of subject matter jurisdiction. *Swift & Co.* v. *United States*, 276 U.S. 311, 48 S.Ct. 311, 72 L.Ed. 587 (1928). But a decree that " 'appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause.' " *Id.* at 324, 48 S.Ct. at 314 (quoting *Nashville, C. & St. L. R. Co.* v. *United States*, 113 U.S. 261, 5 S.Ct. 460, 28 L.Ed. 971 (1885)).

We must consider only the propriety of the entry of the decree. The merits of the judgment are not before us, except for two limited purposes. The decree may have been beyond the district court's jurisdiction to enter or the substance of the decree may be contrary to the public interest.

I. *Jurisdiction*

Bechtel argues that its alleged boycott activities were beyond the scope of the antitrust laws. Bechtel contends this means it was beyond the power of the district court to enter the decree or contrary to the public interest for it to do so.

The jurisdictional part of this argument "fails to distinguish an error in decision from the want of power to decide." *Swift & Co., supra*, 276 U.S. at 330, 48 S.Ct. at 316. If Bechtel is correct in its assertion that the boycott is beyond the reach of the antitrust laws, it proves at most that the complaint failed to state a cause of action. Such a failure is not a jurisdictional defect. *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

A judgment dismissing an action for failure to state a claim is a judgment on the merits. In dismissing an action a court must assume jurisdiction. *Id.* Any error by the court in refusing to enter such a judgment might be corrected on appeal if Bechtel had not waived the defect by its consent. *Swift & Co., supra*, 276 U.S. at 331, 48 S.Ct. at 316-317.

Bechtel was not required to give its consent to the judgment it now protests. It had a right to litigate the applicability of the antitrust laws to its alleged participation in the Arab boycott. It voluntarily surrendered that right. We cannot decide whether the complaint stated a cause of action without violating the rule against reviewing the merits of consent decrees.

II. *Consent*

Bechtel contends that the judgment must be vacated because the only basis for its entry, consent, was lacking. In the face of the stipulation Bechtel concededly entered, we must interpret this as an argument that the government withdrew its consent or repudiated the agreement,

or that events occurring after the stipulation equitably require that Bechtel be relieved of its consent.

A. Antitrust Procedures and Penalties Act.

The stipulation filed by the parties called for the consent decree to be entered ". . . at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act . . . ." Bechtel argues that compliance with the APPA was a condition of its consent that was never met. Alternatively, Bechtel contends that the government's violation of the stipulation entitled it to relief from its consent.

Bechtel asserts that the government violated the APPA by failing to file its responses to public comment on the proposed decree until nearly one year after the close of the comment period. The APPA requires a proposed consent decree to be filed in the district court and published in the Federal Register "at least 60 days prior to the effective date of such judgment." 15 U.S.C. § 16(b). It also provides that "[a]ny written comments relating to such proposal *and any responses by the United States thereto*, shall also be filed with such district court and published by the United States in the Federal Register *within such sixty-day period*." *Id.* (Emphasis added.)

Section 16(d) describes the public comment and government response procedure in more detail. It provides in part:

> "(d) During the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. * * * *At the close of the period* during which such comments may be received, *the United*

> *States shall file with the district court and cause to be published in the Federal Register a response to such comments.*"

(Emphasis added.)

Bechtel contends that the government had to file and publish its response to public comments within 60 days of the filing and publication of the proposed decree, unless it received an extension of time from the court. The government argues, and the district court agreed, that the sixty-day period is a minimum time for public comment between publication and entry of a proposed consent decree.

The government's interpretation of section 16(b) ignores the plain language of the statute. Not only public comments, but also the United States' responses are to be filed within the sixty-day period. While the phrase "[a]t the close of the period" in section 16(d) may indicate that the government is allowed some additional time after the end of sixty days to prepare and file responses, it does not mean at any time after the close of the period.

The government's failure to file its responses within the time contemplated by the APPA does not mean, however, that the decree could not be entered. Completion of APPA procedures was required before the judgment could be entered. This requirement was established by the terms of the stipulation, as well as by operation of the statute itself. But we decline to read the stipulation or the statute as making strict technical compliance with the APPA a condition to final entry of the decree.

The structure of the statute and its legislative history indicate that Congress was primarily concerned with allowing sufficient time for comment and response. The time provisions were not established to prevent open-ended scrutiny of a proposed consent decree. It would not

advance the purposes of the statute to adopt a rule that any failure strictly to meet a time limitation precludes entry of a consent decree.

Bechtel has not persuaded us that the phrase in the stipulation "after compliance with the requirements of the Antitrust Procedures and Penalties Act" should be read any more strictly than the statute itself. The non-compliance did not go to the essence of the stipulation. Bechtel admitted at argument that it would not have objected to entry of the decree based on the lapse of time alone. Bechtel has not shown any prejudice to it arising from the government's failure to file its responses to public comments until nearly one year after the close of the comment period.

Bechtel argues that as a result of the government's delay, it has become enmeshed in a conflict between the Department of Justice and the Department of Commerce over the proper response to foreign boycotts and the interpretation of the Export Administration Amendments. Bechtel has not shown how the timely filing of the government's response to public comments would have avoided this conflict, if any. Nor has Bechtel shown that it has less protection because of the delayed filing. The district court specifically declined to decide whether the EAA would require modification of the decree after its entry.

We conclude that the government's failure strictly to comply with the APPA time requirements does not entitle Bechtel to relief from its consent.

III. *Repudiation*

Bechtel asserts that the government breached the stipulation and "destroyed consent" by repudiating the decree's meaning. The repudiation is said to have occurred when the government filed and published its response to public comments on the proposed decree. Bechtel alleges that the government has interpreted the judgment in a

manner inconsistent with the understanding reached by the parties in their negotiations and expressed in the government's competitive impact statement. Bechtel concedes that no words have been altered, but argues that the government's interpretation changed the decree.

The government says that it has not changed its interpretation of the judgment, although it concedes that it made an incorrect statement in the competitive impact statement it filed with the proposed decree. The government characterizes the interpretation offered in its response to public comments as an effort to correct and clarify its obvious earlier mistake, not a change in position. The district court found that the government had not repudiated the proposed judgment.

Bechtel's contention imputes too much power to the government and too little power to the court. The government cannot unilaterally change the meaning of a judgment. When a consent judgment is being interpreted for enforcement purposes a court may rely on certain aids to construction, including the circumstances surrounding the formation of the order. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238, 95 S.Ct. 926, 935, 43 L.Ed.2d 148 (1975). In a later enforcement proceeding Bechtel may persuade a court that its interpretation of the decree is the correct one.

Bechtel's argument is also premature. No court has yet interpreted the judgment, in accordance with the government's construction or otherwise. We are addressing the much narrower issue of the entry of the decree. The language of the decree entered by the district court is precisely that to which Bechtel agreed. The government has not repudiated that language and Bechtel is not entitled to relief from its consent.

Bechtel's arguments concerning the effect of the EAA on the decree are also premature. The court below spe-

cifically declined to modify the decree before its entry on the grounds that such modification should await entry of judgment and development of matters beyond the scope of the application for entry of judgment. The district court did not decide that the EAA would require no modification of the decree. The court did not abuse its discretion in declining to decide the matter at the time of entry of judgment. The modification provisions of the judgment itself could not become operative until the judgment was entered.

IV. *Public Interest*

Bechtel asserts that the district court applied the wrong test in determining whether the consent decree was in the public interest. Furthermore, Bechtel argues, the decree is not in the public interest and the district court erred in so finding.

A. Scope of Inquiry.

The district court stated as it "guidelines for consideration" whether the relief provided for in the proposed judgment was adequate to remedy the antitrust violations alleged in the complaint. The court concluded that the relief was adequate. Bechtel contends this view was erroneously narrow.

The APPA requires a district court to determine that consent judgment [*sic*] is in the public interest before it may be entered. 15 U.S.C. § 16(e). The statute suggests considerations that may be relevant:

> "For the purpose of such determination, the court *may* consider—
>
> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies

actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial."

*Id.* (Emphasis added.)

The statute suggests that a court may, and perhaps should, look beyond the strict relationship between complaint and remedy in evaluating the public interest. We cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public.

The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. *See United States* v. *National Broadcasting Co.*, 449 F.Supp. 1127 (C.D. Cal. 1978). The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." *Id.* at 1143 (quoting *United States* v. *Gillette Co.*, 406 F.Supp. 713, 716 (D.Mass. 1975)). More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

We conclude that the inquiry undertaken by the district court was appropriate in scope. The record shows that the district court considered potential conflicts between the EAA and the decree and the government's allegedly inconsistent interpretations in its evaluation of the public

interest. The only matters the court expressly refused to consider were contentions going to the merits of the underlying claims and defenses. This refusal was proper.

B. Merits.

Finally, Bechtel argues that the district court erred in determining that the decree is in the public interest. Bechtel contends that entry of the judgment is inimical to the public interest because it increases uncertainty as to what conduct Bechtel may engage in, it will encourage litigation by others because of its ambiguity, it conflicts with the balance of national and international interests struck by Congress and the executive branch and embodied in the EAA, it is unnecessary because of the EAA, it enjoins conduct beyond the reach of the antitrust laws, it implicitly condones the government's failure to comply with the APPA, and the public would benefit from trial of the issues.

In the court below, and here, Bechtel offered only conclusory statements that increased litigation is likely as a result of this decree. Such statements are not sufficient to show that entry of the decree is not in the public interest. Likewise, Bechtel has not shown how the public would benefit from a trial of the issues any more than it would in any case that is ended by settlement.

Any uncertainty Bechtel is experiencing about what it may or may not do under the decree is not necessarily a matter of the public interest. Furthermore, the uncertainty is no greater than that which would exist without a decree at all. Bechtel is always entitled to the protection of a judicial interpretation of the judgment. Similarly, any conflict between the EAA and the decree is not relevant to a determination of the public interest. The decree contains modification provisions. If Bechtel is entitled to substantive changes in the decree it may seek them.

It is not contrary to the public interest, as contemplated by the APPA, to enter a decree that is not necessary, or that grants relief to which the government might not be strictly entitled. The public does not suffer because Bechtel consented to limitations on its activities that could not otherwise be imposed. Bechtel cannot transform self-interest to public interest by pointing to the importance of its economic activity to society. Such an argument would apply to most antitrust consent decrees.

Entry of the decree in the face of the government's failure strictly to observe the APPA time requirements does not condone or sanction such a violation. It would not serve the public interest to assure government compliance with the time limitations by refusing to enter the decree. The remedy is far too drastic and indirect. Bechtel has shown no prejudice from the delay, and the public benefit from entry of the decree far outweighs any detriment from the appearance of sanctioning a wrong.

## CONCLUSION

Bechtel agreed to the entry of the judgment from which it appeals. Events occurring since it stipulated its consent do not entitle it to relief. It may seek protection through judicial interpretation or modification of the judgment. The entry of the judgment itself was proper and is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 79-4194

DC CV 76-99 WAI

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

BECHTEL CORPORATION, BECHTEL INCORPORATED,
BECHTEL POWER CORPORATION, *et al.*,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 18, 1981

## APPENDIX B

**Memorandum of Decision of U.S. District Court for the Northern District of California; Appendix: Final Judgment; Entry of Judgment**

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[Filed Jan. 5, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-76-99-WAI

UNITED STATES OF AMERICA,
*Plaintiff,*

v.

BECHTEL CORPORATION
*Defendant.*

## MEMORANDUM OF DECISION

This is an application by the United States for entry of a Consent Judgment proposed by the United States in this cause as provided by the provisions of Title 15 U.S.C. § 16.

The motion is granted and the Proposed Consent Judgment is ordered entered forthwith.

As authorized by the provisions of Title 15 U.S.C. § 16(f)(3) this Court previously authorized participation in these proceedings by interested persons and entities as *amici*. These are the Business Roundtable, Chamber of Commerce of the United States of America, the National Foreign Trade Council, the Rule of Law Committee, Associated General Contractors of America, American Jewish Congress, American Jewish Committee and the Anti-Defamation League of B'Nai B'rith. I have considered each of the briefs and memoranda which have been filed by these *amici* together with those filed by the plaintiff

United States of America and the defendant Bechtel Corporation, Bechtel Incorporated, Bechtel Power Corporation, Bechtel International Inc., and Bechtel International Corporation (hereinafter collectively called Bechtel). The Competitive Impact Statement and Response to Comments filed by plaintiff consonent [*sic*] with the provisions of Title 15 U.S.C. § 16(b) and (d), the Written Comments received and the Competitive Impact Statement filed by Bechtel have all been considered as well together with oral argument by counsel for plaintiff, for Bechtel, and for certain *amici* which was heard on September 10, 1978. On the basis of my consideration of each of the above enumerated submissions, of the terms of the Proposed Judgment and their competitive impact, and of the impact of the Proposed Judgment upon the public generally I conclude that the entry of the Proposed Judgment is in the public interest.

*Factual Summary*

On January 16, 1976, plaintiff filed this action against Bechtel alleging that the latter had violated Section 4 of the Sherman Act by its refusal to deal with United States persons and companies blacklisted by the terms of the so-called "Arab boycott," thus restraining interstate and foreign commerce. Bechtel answered on April 26, 1976. On January 10, 1977, the parties agreed upon the form of Consent Judgment which is now sought to be entered.[1] Thereafter, plaintiff undertook to comply with the Antitrust Procedures and Penalties Act, Title 15 U.S.C. § 16, in the manner now to be discussed. The Competitive Impact Statement required by § 16(b) was filed by plaintiff on January 16, 1977. On that same date Bechtel also filed a Competitive Impact Statement. During the next ensuing sixty days, comments upon the entry of the decree

[1] The Proposed Consent Judgment is set forth in its entirety in the Appendix.

were received from various commentators, including the American Jewish Committee, the Anti-Defamation League of B'Nai B'rith, the National Contractor's Association, the Commonwealth of Massachusetts, and thirteen members of the United States House of Representatives. The plaintiff filed a Response to these comments as required by § 16(d), but did not do so until March 28, 1978, approximately one year after the close of the sixty day comment period. During that period Congress enacted the Export Administration Amendments of 1977 (EAA) which set forth a comprehensive set of rules governing business practices of United States persons in relation to international political boycotts. Following the filing and publication of plaintiff's Response on March 31, 1978, plaintiff filed a Certificate of Compliance with the Antitrust Procedures and Penalties Act, and on May 10, 1978, moved for the entry of the Proposed Consent Judgment.

*Objections to Entry of Proposed Consent Judgment*

Bechtel and each of the *amici* have filed objections to the entry of the Proposed Consent Judgment.[2]

Bechtel opposes entry upon the grounds that it has withdrawn its Consent [*sic*] to be bound by the Judgment because plaintiff's interpretation of certain portions of the Judgment as revealed in its Response indicates a unilateral modification of the terms of the Judgment; that plaintiff, by reason of its interpretation of the Judgment as set forth in its Response repudiated the previously agreed Judgment; the Judgment as drawn conflicts materially with the provisions of the Export Administration Amendments of 1977 and produces inconsistent directives from two separate government agencies which are not in

[2] At oral argument *amici* American Jewish Committee, American Jewish Congress, and Anti-Defamation League of B'Nai B'rith withdrew opposition to entry, and joined with plaintiff in requesting that the Proposed Consent Judgment be entered.

the public interest; and, there is a procedural defect in the proceedings in that plaintiff's Response was not filed within the time limited by the Antitrust Procedures and Penalties Act.

The objections filed by *amici* other than the three Jewish organizations are largely concerned with the purported discrepancies between enforcement of the antitrust laws as exemplified in the Proposed Judgment and the provisions of the Export Administration Amendments of 1977, and the assertion that the public interest requires that the alleged conflicts between the two be reconciled by the refusal of the Court to enter the Proposed Judgment or by a modification of the terms of the Judgment sufficient to remove the inconsistency.

*Scope of the Consideration Upon Motion to Enter Proposed Judgment*

This motion comes before me solely and entirely because of the compulsion of the Antitrust Procedures and Penalties Act. The issues presented by the motion, and the scope of my consideration thereof, are defined by the provisions of that Act, 15 U.S.C. § 16(e), and require a determination as to whether or not the entry of the Proposed Consent Judgment is in the public interest. As well stated in another case[3] in making this determination I am to test the Proposed Judgment ". . . on the basis of the relief provided, on the assumption that the government would have won the case." Thus, any contentions made here going to the merits of the claims or defenses which might have been asserted if the case had gone to trial seem superfluous in the context of this motion.

The guidelines for consideration are whether the relief provided for in the Proposed Judgment is adequate to remedy the allegations of antitrust violation as set out in

[3] *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975).

the Complaint. It is apparent to me that the relief provided for does constitute an adequate remedy, and since the three Jewish organization *amici* now support the entry of the Judgment, no one now contends that it does not. To the contrary Bechtel and the other *amici* contend vigorously that the relief provided is overly stringent, that it is unnecessary in the light of the enactment of the EAA of 1977, that it obfuscates the intent of Congress in enacting the EAA by providing an inconsistent and confusing set of guidelines for Americans trading in the Mid East, and that it improperly extends the reach of the antitrust laws extraterritorially. In addition, as stated before, Bechtel contends that by plaintiff's interpretations of §§ IV, V and VI of the Proposed Judgment plaintiff has effectively destroyed the reality of its Consent [*sic*] and that of Bechtel. I will discuss these contentions in the paragraphs following.

*Reality of Consent*

Plaintiff has not expressly withdrawn its Consent [*sic*]. As plaintiff points out in its Reply Brief, the fact that plaintiff now moves for entry of the Proposed Judgment strongly contraindicates Bechtel's assertion that plaintiff has withdrawn its consent to entry of the Judgment. Bechtel contends that plaintiff "by deed if not by word" has repudiated the agreement of the parties which is purportedly memoralized [*sic*] in the Proposed Judgment, by reason of its interpretation as set forth in its Response to commentators of three particulars of the Proposed Judgment. In making this contention Bechtel does not suggest, nor could it, that anyone has suggested any modified or revised wording in the Judgment itself. If such modification was suggested there would be more thrust to Bechtel's argument. Cf. *City of Burbank* v. *General Electric Co.*, 329 F.2d 825 (9th Cir. 1964). Bechtel here contends that plaintiff, by its Response, has effectively

revised its interpretation of § IV(A) of the Judgment by averring that extraterritorial acts are to be brought within the ambit of the Judgment and the antitrust laws. Plaintiff counters that in its Response it simply sought to correct the possible impression given by its Competitive Impact Statement that a territorial limitation exists with respect to § IV(A), which section provides:

> "The defendants are each enjoined and restrained from:
>
> (A) Performing, implementing or enforcing any provision or term in any contract, agreement, arrangement or understanding which provides that any defendant boycott or refuse to deal with any United States Blacklisted Person as a Subcontractor in connection with any Major Construction Project in which any defendant is acting as a Prime Contractor or Subcontractor."

On page 11 of its Competitive Impact Statement with respect to § IV(A) plaintiff states, in part as follows:

> "Section IV(A) prevents defendants from taking steps to effectuate such an agreement in the United States, but not in an Arab League Country."

The Judgment has no words of limitation which reflect the statement just quoted. In that part of its Response which deals with this subject matter plaintiff stated at page 8, fn.6:

> "The CIS at 11 states that Section IV(A) prevents defendants from taking steps to effectuate [a boycott] agreement *in the United States, but not in an Arab League Country.* (Emphasis added) The Memorandum correctly points out that the underlined language engrafts a territorial limitation onto Section IV(A) that did not appear in the decree. We take this opportunity to confirm that the underlined language was intended only to reflect the jurisdic-

tional principles discused at CIS 7. To the extent that the underlined language is inconsistent with said principles as they are discussed at CIS 7 it is to be disregarded."

The language at CIS 7 is as follows:

"(c) *The Nature of the Violation of the Antitrust Laws*

A conspiracy, even if entered into abroad among foreigners, may be subject to United States antitrust law if it is capable of effecting a restraint upon, and is intended to affect United States domestic or foreign commerce. (Citation omitted) However, here since (1) the United States may not be reasonably expected to achieve compliance by the attempt to impose its own law in conflict with that of a foreign jurisdiction; (2) the illegal conduct is to take place in the territory of the foreign sovereign; and (3) the application of United States antitrust law to foreign conduct directly conflicts with the foreign law valid in a foreign sovereignty thereby imposing substantial hardship upon the one against whom it would be applied, it would be inappropriate both as a matter of law and enforcement policy to apply United States law to this concerted refusal to deal as it operates in Arab League Countries. . . Accordingly, it would be inappropriate to apply United States antitrust law to the Arab Boycott as so far described."

These expressions can scarcely be said to be repudiations of the Proposed Judgment. At most the expression in the Response of which Bechtel complains amounts to plaintiff's justification of words used in its Competitive Impact Statement in response to a criticism voiced by a commentator. As such, it is at most an attempt to reconcile the Competitive Impact Statement with the language

of the Proposed Judgment. Bechtel has indicated its agreement with and approval of the plaintiff's Competitive Impact Statement. The cited language of the Response makes no change or alteration of the language of the Competitive Impact Statement, but only recites that in plaintiff's view the language cited at 11 must be construed in light of the language cited at 7. The language of the Proposed Judgment is in no way altered by any of the cited language. The contention of Bechtel that a repudiation has occurred is not persuasive.

Bechtel says that plaintiff has interpreted the Proposed Judgment contrary to the previously expressed intention of the parties with respect to negative certificates of origin. It refers to the language of the Response at page 12, lines 13-21:

> "The absence in the decree of a provision expressly enjoining Bechtel from furnishing negative certificates of origin is due to the fact that we have no evidence which indicates that Bechtel had in fact been furnishing such certification. Further, negative certification is irrelevant unless used to enforce the boycott. More importantly, however, as the Memorandum (to which the response is addressed) concedes, Section VI(A) (sic) of the decree clearly proscribes such conduct."

Inasmuch as the plaintiff admittedly possessed no evidence with respect to Bechtel's furnishing of negative certificates, such conduct is not one of the acts which the Proposed Judgment is intended to remedy. The quoted language of the Response in no way alters the language and impact of the Proposed Judgment. I am unable to perceive how plaintiff's statements as to its policies and beliefs can be said to negative the language of the Proposed Judgment. If in future implementation of the Judgement [*sic*] a controversy arises in which plaintiff asserts its policies and contentions with respect to the ambit of the Judgment, the Court may or may not agree with plain-

tiff's view. The mere expression of such a view in the absence of an actual controversy does not in my opinion effect an impermissable [*sic*] alteration of the language and impact of the Proposed Judgment.

The same observations apply with respect to Bechtel's contention concerning the language of the Response answering criticism of the unilateral selection provisions of the Judgment. The Response says at page 6, line 14 through page 7, line 8:

> "The antitrust laws do not prohibit Bechtel from complying with unilateral and specific selection of a client based on illegitimate commercial criteria so long as Bechtel itself does not participate in the selection process, which is the heart of the boycott. As the CIS notes, Section V(C) simply 'recognizes the client's right to determine independently the specific source of goods or services it wishes to procure. CIS at 19. Further, the Memorandum completely ignores the fact that Section V(C) does not relieve Bechtel from its obligation under IV(F) to ignore the boycott in making its recommendation to the client. Prior to this decree the client would never even consider the bids of Blacklisted Persons since Bechtel would be prohibited from soliciting such bids. Moreover, relief of the kind implied by the Memorandum would transgress the Complaint and set a precedent that could induce an abrupt and total termination of Bechtel's business in the Middle East. There would appear to be no mandate under the antitrust laws or other sources of significant United States public policy to attempt to achieve such relief by way of the decree. We note that in fashioning an anti-boycott law Congress itself recently determined that such novel and drastic relief is neither necessary nor appropriate." (Footnote reference to Export Administration Amendments of 1977, Sec. 201 § 4(a)(2)(d)).

Further at page 16, line 16 through page 17, line 3:

> "The Memorandum criticizes Section V(C) of the decree on the ground that it allows Bechtel to boycott blacklisted companies, if directed by Arab countries. (p.2) Section V(C) merely authorizes Bechtel to comply with unilateral and specific selection by a client. As the CIS notes, 'this provision recognizes the client's right to determine independently the specific source of goods or services it wishes to procure.' CIS at 19. The mere fact that a selection is based on certeria [*sic*] which are not consonant with American political and legal concepts is irrelevant so long as Bechtel itself refrains from participating in the selection process. Moreover, even if a selection is consistent with a foreign group boycott, that selection is 'unilateral' within the meaning of the antitrust laws so far as Bechtel does not participate in the selection process."

Further, at page 13, footnote 11, liens [*sic*] 27-29:

> ". . . under Section IV(A) of the Decree, of course, Bechtel is prohibited from making a unilateral and specific selection to implement the boycott even if it established a subsidiary in a boycotting country. Nor may Bechtel or *any other person* make such a selection to implement the boycott." (Emphasis added)

It is the last quoted material that Bechtel cites as being contrary to its agreement. In light of the entire discussion of unilateral selection contained in the Response, some of which is quoted above, it cannot be said that as a result of the last quoted language a Bechtel client would be prohibited from exercising unilateral selection, and Bechtel incur liability thereby. The words "any other person" if so interpreted would be inconsistent with every other part of the Response which discusses unilateral selection, and would be senseless. Thus, those words, read

in the overall context of the Response cannot be regarded as constituting a repudiation of the agreed upon form of the Judgment. Indeed, in the context of the Response they can only be regarded as referring to persons other than Arab country clients, such as subsidiaries, agents and the like.

In any event there is no provision in law authorizing the withdrawal of consent by a defendant such as Bechtel. The Antitrust Procedures and Penalties Act does not permit it or address it. No authority is cited by any party authorizing such a withdrawal in an antitrust case. The closest analagous cases cited,[4] involving consent decrees in Federal Trade Commission matters do not aid Bechtel.

*Effect of Enactment of Export Administration Amendments of 1977*

Bechtel and its supporting *amici* strongly suggest that the Proposed Judgment and the EAA are in conflict in important particulars, and that they should be harmonized in order to provide one set of clear rules for the guidance of those Americans who trade with Middle East countries. I am not persuaded that such a modification, if it is necessary and proper, should be undertaken prior to the entry of the Proposed Judgment. Until the Judgment is entered and implemented no clear factual situation will become apparent sufficient to bring into play the modification provisions of Section VI of the Proposed Judgment. As suggested in plaintiff's Reply Brief, a proceeding to modify taken pursuant to Section VI may well involve considerations and evidentiary matters which are beyond the scope of this application for the entry of the Proposed Judgment.

---

[4] *Johnson Products Co.* v. *FTC*, 549 F.2d 35 (7th Cir. 1977); *Ford Motor Co.* v. *FTC*, 547 F.2d 954 (6th Cir. 1976).

I reject the suggestion of Bechtel that the enactment of the 1977 Amendments limits the operation of the antitrust laws and thus requires the pre-entry modification of the Proposed Judgment. The congressional intent behind the 1977 Amendments was clearly expressed as to the effect of the Amendments upon the antitrust laws:

> "Both bodies of law [antitrust and civil rights] would in no way be affected by the passage of this legislation." ([S. Rep. No. 95-104, 95th Cong., 1st Sess., p. 47].

Furthermore, remedial harmonization of the Judgment and the Amendments to the extent that they may be said to be inconsistent is more appropriately directly [*sic*] to Congress than to a District Court considering a Proposed Judgment within the strictures of the Antitrust Procedures and Penalties Act.

*Procedural Defect*

Bechtel contends that Title 15 U.S.C. § 16(b) and (d) require the United States to both receive comments and publish a Response thereto within the sixty days limited therein, and the failure of compliance permits the withdrawl of consent by Bechtel. Plaintiff points out that the purpose of the Antitrust Procedures and Penalties Act is to prevent a "rush to judgment" without a full exposition and consideration of a Proposed Consent Judgment in the light of the public interest, and that an extension of the time devoted to such consideration is consistent with the purpose of the statute, and absent some showing of prejudice cannot nullify a Consent Judgment. I am inclined to agree with plaintiff's view. Furthermore, the statute cannot be read as imposing such an obligation upon the United States. It provides in substance that at least sixty days prior to the effective date of a Proposed Consent Judgment the United States shall file the Proposed Judgment in the District Court in which the case

pends and cause it to be published in the Federal Register within said sixty day period [§ 16(b)]; that a Competitive Impact Statement shall be filed by the United States within the sixty day period [§ 16(b)]; that the United States shall cause to be published in certain newspapers of general circulation matters relating to the Proposed Judgment within the sixty day period [§ 16(c)]; and that at the close of the sixty day period the United States shall file its Response [§ 16(d)]. It is clear therefore, that the statute only requires that the United States file and publish no less than sixty days prior to the effective date of the Judgment. Nowhere does the statute prohibit a longer period of time in excess of that statutory minimum. Inasmuch as the time limited [*sic*] appears to constitute only the expression of the minimum limit within which the mandated tasks be accomplished, no statutory violation occurs by the filing of the Response of the United States some twelve months after the close of the period of comment. At any rate, there is no showing of prejudice to any party.

Let the Decree be entered.

Dated: January 5, 1979

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

# APPENDIX

## FINAL JUDGMENT

Plaintiff, United States of America, having filed its Complaint herein on January 16, 1976, and defendants Bechtel Corporation, Bechtel Incorporated, Bechtel Power Corporation, Bechtel International, Inc. and Bechtel International Corporation, having filed their Answer thereto on April 26, 1976; and plaintiff and defendants by their attorneys having consented to the entry of this Final Judgment, without the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by any party consenting hereto with respect to any such issue:

NOW THEREFORE, without the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of plaintiff and of each of said defendants, it is hereby

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

### I

This Court has jurisdiction over the subject matter hereof and the parties consenting hereto. The Complaint states a claim upon which relief may be granted against each defendant under Section 1 of the Act of Congress of July 2, 1890, commonly known as the Sherman Act (15 U.S.C. § 1), as amended.

### II

As used herein, the term:

(A) "Person" means any individual, corporation, partnership, association, joint venture, firm or other business entity;

(B) "Arab League Countries" means the following countries and other present and future members of the League of Arab Countries and each of them: Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Peoples' Democratic Republic of Yemen, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates (including Abu Dhabi and Dubai) and Yemen Arab Republic;

(C) "Blacklisted Person" means any Person included in one or more lists maintained, in connection with the boycott by Arab League Countries of Israel, by the Central Office for the Boycott of Israel or by any of the Arab League Countries, of Persons with whom citizens, business or nonbusiness entities and governments or other public bodies in Arab League Countries may conduct only limited, if any, trade or commerce;

(D) "United States", when used in conjunction with "Blacklisted Person", means that such individual resides in the United States, or such entity (whether or not a subsidiary of Affiliate of a foreign business entity) maintains its principal office or place of business in the United States or is organized under the laws of the United States or of any State, Territory, District, Commonwealth or Possession of the United States;

(E) "Major Construction Project" means any project in an Arab League Country, the purpose of which is to construct an installation, facility, building or system, including, but not limited to, oil or gas refineries, oil or gas pipelines, airports, nuclear or conventional power generating facilities, harbors, gas liquefication facilities, transportation systems or hotel or office buildings;

(F) "Prime Contractor" means any Person which has principal responsibilities for managing, supervising or administering a Major Construction Project or for

providing construction, engineering, procurement or consulting services in connection with such Major Construction Project;

(G) "Subcontractor" means any Person, other than a Prime Contractor, which produces or provides parts, systems, material, equipment or services used in connection with Major Construction Projects, whether or not said Person enters into any contractual relationship with a Prime Contractor;

(H) "Affiliate" means any Person that directly, or indirectly through one or more intermediaries, is under common control with any defendant;

(I) "Client" means any Person, government or governmental agency which retains a defendant as a Prime Contractor or Subcontractor on a Major Construction Project, or, in the case where a defendant is a Subcontractor, which retains the Prime Contractor; and

(J) "International Agreement" means any treaty to which the United States is a party, any international agreement entered into by the United States pursuant to the independent powers of the President provided under the Constitution, or any international agreement entered into by the United States which has subsequently been approved pursuant to a joint resolution of Congress.

## III

The provisions of this Final Judgment shall apply to each defendant and each of its officers, directors, agents, employees, subsidiaries, Affiliates, and to the successors and assigns of Bechtel Corporation or Bechtel Incorporated, and to all other Persons in active concert or participation with any defendant that shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

The defendants are each enjoined and restrained from:

(A) Performing, implementing or enforcing any provision or term in any contract, agreement, arrangement or understanding which provides that any defendant boycott or refuse to deal with any United States Blacklisted Person as a Subcontractor in connection with any Major Construction Project in which any defendant is acting as a Prime Contractor or Subcontractor; or

(B) Requiring that any other Person boycott or refuse to deal with any United States Blacklisted Person in connection with any Major Construction Project in which any defendant is acting as a Prime Contractor or Subcontractor; or

(C) Performing, implementing or enforcing any provision or term in any contract, agreement, arrangement or understanding which provides that any other Person boycott or refuse to deal with any United States Blacklisted Person in connection with any Major Construction Project in which any defendant is acting as a Prime Contractor or Subcontractor; or

(D) Entering into within the United States any contract, agreement, arrangement or understanding:

(1) To boycott or refuse to deal with any United States Blacklisted Person as a Subcontractor in connection with any Major Construction Project; or

(2) Which provides that any Subcontractor boycott or refuse to deal with any United States Blacklisted Person in connection with any Major Construction Project in which any defendant acts as a Prime Contractor or Subcontractor; or

(E) Serving as an agent or representative for any other Person or Client for the purpose of the making,

performing, implementing or enforcing in the United States of a provision or term of any contract, agreement, arrangement or understanding which provides that any Person or Client boycott or refuse to deal with any United States Blacklisted Person as a Subcontractor in connection with any Major Construction Project, if any defendant knows or has reason to believe that such provision or term exists therein and that such agreement or refusal is being made, performed, implemented or enforced; or

(F) Failing to recommend or include any Person because such Person is a United States Blacklisted Person in making any recommendation or evaluation, or submitting any list of possible Subcontractors, or soliciting bids from possible Subcontractors, in connection with any Major Construction Project; or

(G) Selecting a Subcontractor for purchases, or recommending a possible Subcontractor for purchases by any defendant, or soliciting bids from possible Subcontractors, to provide parts, systems, material, equipment or services produced within the United States for a Major Construction Project from a list or group of possible Subcontractors limited by the Client to those named or approved by the Client if any defendant knows or has reason to believe that any Person, otherwise qualified, has been excluded or struck from such list or group because it is a United States Blacklisted Person; or

(H) Maintaining in the United States or using for any purposes prohibited in this Section IV, in connection with any Major Construction Project, any list which any defendant knows or has reason to know is a list of (1) United States Blacklisted Persons, or (2) approved or accepted possible Subcontractors, from which any Person, otherwise qualified, has been excluded because it is a United States Blacklisted Person.

V

Nothing in the preceding Section IV shall be construed to preclude or prevent any defendant from:

(A) Entering into outside the United States any contract, agreement or purchase order pertaining to work on a Major Construction Project in which it is provided in form or substance that a defendant or Subcontractor shall abide by the requirements of the laws of the country in which such Major Construction Project is located, or that such agreement, contract or purchase order shall be construed according to said laws, provided, however, the existence of any such clause shall not relieve any defendant from any specific prohibition or obligation of this Final Judgment; or

(B) Purchasing for and providing to any Major Construction Project, in whole or in part, and on such basis of selection as may be desired by a defendant or required by a Client, parts, systems, material, equipment or services of Subcontractors produced and utilized outside the United States; or

(C) Purchasing for and providing to any Major Construction Project, in its own name or in the name of its Client, parts, systems, material, equipment or services produced in the United States by a Subcontractor which has been specifically and unilaterally selected by the Client, whether or not such selection is made from a list, report or recommendation prepared and furnished by any defendant and without regard to the basis of selection or designation by the Client; or

(D) Performing work on or providing services (including, without limitation, expediting, inspection and traffic) to any Major Construction Project where the Client has independently purchased or procured parts, systems, material, equipment or services, regardless of the source or basis of selection thereof, provided, how-

ever, that any such work or services performed within the United States do not include inspection to determine whether the Subcontractor is a United States Blacklisted Person; or

(E) Using competitive bidding to procure parts, systems, material, equipment or services for a Major Construction Project by issuing invitations to bid to possible Subcontractors, including but not limited to Subcontractors proposed by the Client, and, by analysis and evaluation of bids received, making a recommendation or recommendations to the Client based on such analysis and evaluation for selection of the Subcontractor by the Client independently of any defendant, provided that any analysis or evaluation referred to in this Subsection does not include whether a possible Subcontractor is a United States Blacklisted Person.

VI

If any Act of Congress is enacted or the United States becomes a party to any International Agreement, either of which creates rights or benefits with respect to business in Arab League Countries which Persons not subject to the provisions of this or a similar Final Judgment are entitled to exercise or enjoy consistent with the antitrust laws, then, upon application to the Court by any defendant, the terms set forth herein shall be deleted or modified as in the Court's determination is necessary to permit said defendant to exercise or enjoy such rights or benefits.

VII

If plaintiff herein becomes plaintiff in an action in which a final judgment is entered by consent which relates to the same or similar matters as those covered herein, and if the terms of such judgment are different than the terms specified herein, then, upon application

to the Court by any defendant, the terms set forth herein shall be modified as is necessary to prevent any defendant from being placed at a competitive disadvantage with respect to Major Construction Projects, provided, however, that this Section VII neither adds to nor derogates from the right of any party to move under Section IX hereof in the light of any final judgment in a litigated case.

## VIII

For the purpose of determining or securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, from time to time:

(A) Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to a consent defendant made to its principal office, be permitted:

(1) Access during office hours of such defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of the consenting defendant, who may have counsel present, relating to any of the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of such defendant, and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division made to a consenting defendant's prin-

cipal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

No information or documents obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to any Person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings in which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law. If at the time information or documents are furnished by any defendant to plaintiff, said defendant represents and identifies in writing the material in any such information or documents which is of the type described in Rule 26(c)(7) of the Federal Rules of Civil Procedure, or the material which is diplomatically sensitive, and said defendant marks each pertinent page of such material, "Subject to claim of protection under the Federal Rules of Civil Procedure," then ten days' notice shall be given by plaintiff to said defendant prior to divulging such material other than (i) to a duly authorized representative of the Executive Branch of the United States, (ii) in a Grand Jury proceeding, or (iii) in any legal proceeding to which any defendant is a party.

## IX

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction of this Final Judgment, modification of any of the provisions hereof, enforcement of compliance herewith, or punishment of any violations hereof, and for the purpose of enabling any defendant to object to any re-

quest made pursuant to Section VIII hereof or to any divulgence or disclosure proposed in any notice given by plaintiff pursuant thereto.

X

All provisions of the Final Judgment, unless terminated or modified prior thereto, shall terminate twenty (20) years from the date of entry hereof.

VI [*sic*]

Entry of this Judgment is in the public interest.

Dated: January 5, 1979

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

[Filed Jan. 23, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-76-99-WAI

UNITED STATES OF AMERICA,
*Plaintiff*,

v.

BECHTEL CORPORATION,
*Defendant*.

JUDGMENT

In accordance with this Court's Memorandum of Decision filed January 5, 1978 [*sic*],

JUDGMENT is hereby entered.

Dated: January 22, 1979

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

Copies mailed to parties of Record

## APPENDIX C

### Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976)

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(b) Consent judgments and competitive impact statements; publication in Federal Register; availability of copies to the public

Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formulating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

(1) the nature and purpose of the proceeding;

(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained

thereby, and the anticipated effects on competition of such relief;

(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) a description of the procedures available for modification of such proposal; and

(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

(c) Publication of summaries in newspapers

The United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—

(i) a summary of the terms of the proposal for consent judgment,

(ii) a summary of the competitive impact statement filed under subsection (b) of this section,

(iii) and a list of the materials and documents under subsection (b) of this section which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.

(d) Consideration of public comments by Attorney General and publication of response

During the 60-day period as specified in subsection (b) of this section, and such additional time as the United

States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b) of this section. The Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require that shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments.

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Filing of written or oral communications with the district court

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the

district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Inadmissibility as evidence of proceedings before the district court and the competitive impact statement

Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 15a of this title nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

## APPENDIX D

**Title II of the Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979)**

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## TITLE II—FOREIGN BOYCOTTS

### PROHIBITION ON COMPLIANCE WITH FOREIGN BOYCOTTS

SEC. 201. (a) The Export Administration Act of 1969 is amended by redesignating section 4A as section 4B and by inserting after section 4 the following new section:

"FOREIGN BOYCOTTS

"SEC. 4A. (a)(1) For the purpose of implementing the policies set forth in section 3(5)(A) and (B), the President shall issue rules and regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:

> "(A) Refusing, or requiring any other person to refuse, to do business with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of the boycotting country. The mere absence of a business

relationship with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person, does not indicate the existence of the intent required to establish a violation of rules and regulations issued to carry out this subparagraph.

"(B) Refusing, or requiring any other person to refuse, to employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

"(C) Furnishing information with respect to the race, religion, sex, or national origin of any United States person or of any owner, officer, director, or employee of such person.

"(D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country. Nothing in this paragraph shall prohibit the furnishing of normal business information in a commercial context as defined by the Secretary of Commerce.

"(E) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the

activities of any charitable or fraternal organization which supports the boycotted country.

"(F) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by rules and regulations issued pursuant to this paragraph, and no United States person shall, as a result of the application of this paragraph, be obligated to pay or otherwise honor or implement such letter of credit.

"(2) Rules and regulations issued pursuant to paragraph (1) shall provide exceptions for—

"(A) complying or agreeing to comply with requirements (i) prohibiting the import of goods or services from the boycotted country or goods produced or services provided by any business concern organized under the laws of the boycotted country or by nationals or residents of the boycotted country, or (ii) prohibiting the shipment of goods to the boycotting country on a carrier of the boycotted country, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

"(B) complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms after the expiration of 1 year following the date of enactment of the Export Administration Amendments of 1977 other than with respect to carriers or route of shipment as may be

permitted by such rules and regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

"(C) complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurers, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

"(D) complying or agreeing to comply with export requirements of the boycotting country relating to shipments or transshipments of exports to the boycotted country, to any business concern of or organized under the laws of the boycotted country, or to any national or resident of the boycotted country;

"(E) compliance by an individual or agreement by an individual to comply with the immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and

"(F) compliance by a United States person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his activities exclusively therein, and such rules and regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade-named, or similarly specifically identifiable products or components of products for his own use, including the performance of contractual services within that country, as may be defined by such rules and regulations.

"(3) Rules and regulations issued pursuant to paragraphs (2) (C) and (2) (F) shall not provide exceptions from paragraphs (1) (B) and (1) (C).

"(4) Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

"(5) Rules and regulations pursuant to this subsection shall be issued not later than 90 days after the date of enactment of this section and shall be issued in final form and become effective not later than 120 days after they are first issued, except that (A) rules and regulations prohibiting negative certification may take effect not later than 1 year afer the date of enactment of this section, and (B) a grace period shall be provided for the application of the rules and regulations issued pursuant to this subsection to actions taken pursuant to a written contract or other agreement entered into on or before May 16, 1977. Such grace period shall end on December 31, 1978, except that the Secretary of Commerce may extend the grace period for not to exceed 1 additional year in any case in which the Secretary finds that good faith efforts are being made to renegotiate the contract or agreement in order to eliminate the provisions which are inconsistent with the rules and regulations issued pursuant to paragraph (1).

"(6) This Act shall apply to any transaction or activity undertaken, by or through a United States or other person, with intent to evade the provisions of this Act as implemented by the rules and regulations issued pursuant to this subsection, and such rules and regulations shall expressly provide that the exceptions set forth in paragraph (2) shall not permit activities or agreements (expresed or implied by a course of conduct, including a pattern of responses) otherwise prohibited, which are not within the intent of such exceptions.

"(b) (1) In addition to the rules and regulations issued pursuant to subsection (a) of this section, rules and regulations issued under section 4(b) of this Act shall implement the policies set forth in section 3(5).

"(2) Such rules and regulations shall require that any United States person receiving a request for the furnishing of information, the entering into or implementing of agreements, or the taking of any other action referred to in section 3(5) shall report that fact to the Secretary of Commerce, together with such other information concerning such request as the Secretary may require for such action as he may deem appropriate for carrying out the policies of that section. Such person shall also report to the Secretary of Commerce whether he intends to comply and whether he has complied with such request. Any report filed pursuant to this paragraph after the date of enactment of this section shall be made available promptly for public inspection and copying, except that information regarding the quantity, description, and value of any articles, materials, and supplies, including technical data and other information, to which such report relates may be kept confidential if the Secretary determines that disclosure thereof would place the United States person involved at a competitive disadvantage. The Secretary of Commerce shall periodically transmit summaries of the information contained in such reports to the Secretary of State for such action as the Secretary of State, in consultation with the Secretary of Commerce, may deem appropriate for carrying out the policies set forth in section 3(5) of this Act.".

(b) Section 4(b)(1) of such Act is amended by striking out the next to the last sentence.

(c) Section 7(c) of such Act is amended by striking out "No" and inserting in lieu thereof "Except as other-

wise provided by the third sentence of section 4A(b)(2) and by section 6(c)(2)(C) of this Act, no".

STATEMENT OF POLICY

SEC. 202. (a) Section 3(5)(A) of the Export Administration Act of 1969 is amended by inserting immediately after "United States" the following: "or against any United States person".

(b) Section 3(5)(B) of such Act is amended to read as follows: "(B) to encourage and, in specified cases, to require United States persons engaged in the export of articles, materials, supplies, or information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person,".

ENFORCEMENT

SEC. 203. (a) Section 6(c) of the Export Administration Act of 1969 is amended —

(A) by redesignating such section as section 6(c)(1); and

(B) by adding at the end thereof the following new paragraph:

"(2)(A) The authority of this Act to suspend or revoke the authority of any United States person to export articles, materials, supplies, or technical data or other information, from the United States, its territories or possessions, may be used with respect to any violation of the rules and regulations issued pursuant to section 4A(a) of this Act.

"(B) Any administrative sanction (including any civil penalty or any suspension or revocation of authority to export) imposed under this Act for a violation of the rules and regulations issued pursuant to section 4A(a) of this Act may be imposed only after notice and opportunity for an agency hearing on the record in accordance with sections 554 through 557 of title 5, United States Code.

"(C) Any charging letter or other document initiating administrative proceedings for the imposition of sanctions for violations of the rules and regulations issued pursuant to section 4A(a) of this Act shall be made available for public inspection and copying.".

(b) Section 8 of such Act is amended by striking out "The" and inserting in lieu thereof "Except as provided in section 6(c)(2), the".

DEFINITIONS

SEC. 204. Section 11 of the Export Administration Act of 1969 is amended to read as follows:

"DEFINITIONS

"SEC. 11. As used in this Act—

"(1) the term 'person' includes the singular and the plural and any individual, partnership, corporation, or other form of association, including any government or agency thereof; and

"(2) the term 'United States person' means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent

foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President".

PREEMPTION

SEC. 205. The amendments made by this title and the rules and regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, and any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.

Approved June 22, 1977.

# Opposition

Office - Supreme Court, U.S.
FILED
NOV 9 1981
ALEXANDER L. STEVAS
CLERK

No. 81-521

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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BECHTEL CORPORATION, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether petitioners were entitled to withdraw from a consent decree because of the possibility that disagreements between the parties as to the interpretation of some provisions of the decree would emerge, when the district court retained the power to interpret the decree and to modify it if necessary to avoid injustice.

2. Whether the government's failure to strictly observe the time limits of the Antitrust Procedures and Penalties Act precluded entry of the consent decree, when petitioners failed to object seasonably to the government's delay and could not show any prejudice resulting therefrom.

3. Whether the district court properly determined that the consent decree was in the public interest pursuant to the Antitrust Procedures and Penalties Act.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statement ..... 1

Argument ..... 6

Conclusion ..... 15


## TABLE OF AUTHORITIES


Cases:

*Board of Regents* v. *Roth*, 408 U.S. 564 ..... 13

*Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271 .... 9

*Hughes* v. *United States*, 342 U.S. 353 ..... 8

*Johnson Products Co.* v. *FTC*, 549 F. 2d 35 .... 9

*United States* v. *Armour & Co.*, 402 U.S. 673 ... 8

*United States* v. *Atlantic Refining Co.*, 360 U.S. 19 ..... 8

*United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 ..... 8

*United States* v. *Ward Baking Co.*, 376 U.S. 327 ..... 8

*United States ex rel. Clark* v. *Gramer*, 418 F. 2d 692 ..... 8

*White* v. *Joyce*, 158 U.S. 128 ..... 8

Statutes and rule:

Antitrust Procedures and Penalties Act, 15 U.S.C. 16 *et seq.*:

15 U.S.C. 16(b) ..... 2, 3, 5, 10, 11, 12

Page

Statutes and rule—(Continued):

15 U.S.C. 16(b)-(g) ..... 10
15 U.S.C. 16(b)-(h) ..... 2
15 U.S.C. 16(d) ..... 2-3, 5, 10-11, 12, 13
15 U.S.C. 16(e) ..... 4, 14

Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, 50 U.S.C. App. 2401 *et seq.* ..... 3

Export Administration Act Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235, 50 U.S.C. App. (Supp. I) 2401 *et seq.* ..... 3

50 U.S.C. App. (Supp. I) 2403-1a(a)(4) ..... 3, 13

Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, 50 U.S.C. App. (Supp. III) 2401 *et seq.* ..... 3

50 U.S.C. App. (Supp. III) 2407(a)(4) ..... 3, 13, 14

Sherman Act, Section 1, 15 U.S.C. 1 ..... 1

9th Cir. R. 4(d) ..... 2

Miscellaneous:

43 Fed. Reg. 3508 (1978) ..... 3

H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. (1974) ..... 9, 12

*Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) ..... 10, 11

Page

Miscellaneous—(Continued):

S. Rep. No. 93-298, 93d Cong., 1st Sess. (1973) ..... 9, 10, 12

S. Rep. No. 95-104, 95th Cong., 1st Sess. (1977) ..... 13, 14

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-521

BECHTEL CORPORATION, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 648 F. 2d 660. The opinion of the district court (Pet. App. A15-A27) is unofficially reported at 1979-1 Trade Cas. (CCH) para. 62,430. The consent decree (Pet. App. A28-A37) is unofficially reported at 1979-1 Trade Cas. (CCH) para. 62,429.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A14) was entered on June 18, 1981. The petition for a writ of certiorari was filed on September 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In January 1976 the United States filed a complaint charging petitioners with violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by a concerted refusal to deal

with United States businesses blacklisted by Arab League nations (R. 1-11).[1] The complaint charged that petitioners agreed to implement the Arab boycott of firms which engage in commerce with Israel (R. 8-9). It further alleged that petitioners refused to deal with blacklisted persons, required subcontractors to refuse to deal with blacklisted persons, and obtained blacklists to facilitate the boycott, thereby restraining interstate and foreign commerce (R. 8-10). An injunction was sought to bar petitioners from refusing to deal with blacklisted persons and from requiring subcontractors to abide by the blacklist (R. 10).

In January 1977 the parties agreed on the terms of a consent decree (Pet. App. A28-A37), entry of which petitioners now seek to have set aside. The parties entered into a stipulation, dated January 10, 1977, which was filed with the district court, providing that the decree could be entered as a final judgment "at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act" (the APPA), 15 U.S.C. 16(b)-(h) (R. 63).[2] However, the stipulation permitted the United States to withdraw its consent upon filing a notice of withdrawal with the court at any time prior to entry of final judgment (*ibid.*). No similar right was reserved to petitioners.

Lodging of the proposed decree was accompanied by the filing of a competitive impact statement (R. 25-56) prepared by the Department of Justice pursuant to the APPA, 15 U.S.C. 16(b). That statement was intended to inform interested members of the public of the nature of the practices which had prompted the government's action and the terms of the settlement. In response, pursuant to the APPA,

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[1]"R." refers to the Excerpt of Record prepared in accordance with Rule 4(d) of the Rules of the United States Court of Appeals for the Ninth Circuit.

[2]The pertinent provisions of the APPA are set forth at Pet. App. A39 *et seq.*

15 U.S.C. 16(b) and (d), the government received extensive comments on the proposed decree from various interested parties advocating a wide range of viewpoints (see Pet. App. A16-A17). While the United States prepared a response to those comments, as required by the APPA, 15 U.S.C. 16(d), Congress considered and ultimately enacted the Export Administration Act (EAA) Amendments of 1977.[3] In January 1978 the Commerce Department published rules to implement that Act.[4] The EAA Amendments were a legislative response to the Arab boycott. They set forth rules governing business practices of United States businesses in relation to international political boycotts and were intended to coexist with and complement the antitrust laws. See 50 U.S.C. App. (Supp. III) 2407(a)(4).[5]

In March 1978, the United States filed and published a response to public comments (R. 65-86) addressing all issues raised therein. On May 10, 1978, the United States moved for entry of the consent decree as a final judgment. Six weeks later, petitioners declared their opposition to the government's motion and to entry of the decree (R. 88-151). Petitioners contended that the government's response to comments revealed such a variance from their own interpretation of the decree that there was a demonstrable lack of

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[3]Pub. L. No. 95-52, 91 Stat. 235, amending the Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841, 50 U.S.C. App. 2401 *et seq.* The Act, as amended in 1977, is found at 50 U.S.C. App. (& Supp. I) 2401 *et seq.* See note 5, *infra*.

[4]43 Fed. Reg. 3508 (1978).

[5]The cited provision, enacted as part of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, 50 U.S.C. App. (Supp. III) 2401 *et seq.*, is identical to former 50 U.S.C. App. (Supp. I) 2403-1a(a)(4), enacted as part of the predecessor EAA Amendments of 1977, which it superseded.

mutual consent. They further contended that entry of the decree was not in the public interest. Petitioners argued as well that the United States had failed to comply with the APPA by filing its response to public comments more than 60 days after filing the proposed decree (R. 99).

2. The district court rejected each of petitioners' contentions. The court found that the decree provided an adequate remedy for the violations which had been charged (Pet. App. A19) and was in all other respects in the public interest within the meaning of the APPA, 15 U.S.C. 16(e) (Pet. App. A19-A27, A37). The court found that the parties had reached, and remained in, agreement upon the terms of the consent decree. It rejected the claim that the United States had expressly or implicitly repudiated any part of that agreement (*id.* at A19-A25). The court scrutinized, and found insubstantial, each of petitioners' allegations of inconsistency between the government's interpretation of the decree embodied in the response to comments, and the language of the underlying agreement and decree (*ibid.*). The court concluded that no "actual controversy" between the parties existed. The court observed further that the mere possibility that the meaning of some language in the decree might become the subject of such a dispute in the future did not negate the parties' agreement upon the provisions of the decree (*id.* at A22-A23).

The district court rejected petitioners' suggestions that enactment of the EAA Amendments precluded entry of the decree, demonstrated that the public interest would not be served by its entry, or required modification of the decree prior to entry (Pet. App. A25-A26). The court noted that Congress had not preempted application of the antitrust laws to petitioners' conduct (*id.*. at A26) and added that if any modification were warranted it should be considered in

the context of a concrete dispute providing a focus for analysis (*id.* at A25). Finally, the district court concluded that the government had complied with the APPA in filing its response to comments. It noted that the 60-day period prescribed by the Act is only the minimum time which must be allowed for public comment on a proposed decree prior to entry, and does not limit the time available to the government prior to the entry of judgment for filing its response to comments (*id.* at A26-A27). Moreover, the court observed that petitioners had shown no prejudice as a result of the timing of the government's response (*id.* at A27).

3. The court of appeals affirmed (Pet. App. A1-A13). The court first held that the government's failure to file its response to public comments within 60 days of publication of the proposed decree in the Federal Register did not entitle petitioners to relief from their agreement (*id.* at A6-A8). Although the court read 15 U.S.C. 16(b) and (d) to require filing of the government's responses within, or shortly after the close of, the comment period,[6] it "decline[d] to read the stipulation or the statute as making strict technical compliance with the APPA a condition to final entry of the decree" (Pet. App. A7). Noting that petitioners did not object to entry of the decree based on the passage of time alone and concluding that they had suffered no prejudice, the court declined to relieve petitioners of their consent on this ground (*id.* at A8).

The court of appeals affirmed the district court's finding that the government had not repudiated the proposed judgment in its response to the public comments (Pet. App.

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[6]The court noted that Section 16(d) "may indicate that the government is allowed some additional time after the end of sixty days to prepare and file responses * * *" (Pet. App. A7).

A8-A10), stressing that "Bechtel's contention imputes too much power to the government and too little power to the court" (*id.* at A9). The court also noted that petitioners' argument was premature since "[n]o court has yet interpreted the judgment, in accordance with the government's construction or otherwise" (*ibid.*). Indeed, the court observed that "[i]n a later enforcement proceeding Bechtel may persuade a court that its interpretation of the decree is the correct one" (*ibid.*). The court of appeals held further that the district court had not abused its discretion by declining to modify the decree prior to entry in response to the enactment of the EAA Amendments (Pet. App. at A9-A10). The court stated that modification based upon appropriate proceedings and a proper record had not been foreclosed, and added that "[t]he modification provisions of the judgment itself could not become operative until the judgment was entered" (*id.* at A10).

Finally, the court of appeals approved the scope of the inquiry undertaken by the district court in determining whether the decree served the public interest, and approved the application of that standard to the decree entered (Pet. App. A10-A13). The court held that the district court had properly refused to consider "contentions going to the merits of the underlying claims and defenses" which would have been litigated absent the consent decree (*id.* at A12). The court concluded that other considerations suggested by petitioners in opposition to the entry of the decree were either unsubstantiated or were merely reflections of petitioners' parochial interests. Accordingly, they did not suggest that the consent decree was contrary to the public interest.

## ARGUMENT

The courts below have carefully examined each of petitioners' contentions and have correctly found them wanting. The decision of the court of appeals does not conflict

with any decision of this Court, or of any other court of appeals, and presents no question of sufficient general importance to warrant review.

1. Petitioners concede that the language of the decree entered by the district court is precisely that which they stipulated might be entered (Pet. 6). They nonetheless argue (*id.* at 6-11) that they should be relieved of their consent because they disagree with the government's interpretation of some of the language in the decree. Both courts below (Pet. App. A9, A21-A22) properly recognized that the fact that the parties might disagree in some future proceeding as to the meaning of certain language in the decree did not reflect a repudiation of the decree by the government.[7] As the court of appeals stressed, petitioners assume incorrectly that the government can unilaterally change the meaning of a judgment (*id.* at A9). In fact, "[n]o court has yet interpreted the judgment, in accordance with the government's construction or otherwise" (*ibid.*). Although the decree has been in force since January 1979, petitioners have yet to cite any concrete situation in which their conduct threatens to place them in contempt.

If, in the future, petitioners have a reasonable concern that a proposed course of conduct may place them in jeopardy, the district court is fully empowered to provide them with a binding interpretation of the decree or to modify the decree. Indeed, as the court of appeals observed, "[i]n a later enforcement proceeding Bechtel may persuade a court that

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[7]The district court's conclusion that the disputes asserted are insubstantial, speculative, and in some respects nonexistent (see Pet. App. A19-A25), has seemingly escaped petitioners' notice. Similarly, petitioners continue to press (Pet. 9-10) their contention that the enactment of the EAA Amendments compels modification of the decree. They seemingly ignore the fact that consideration of the appropriateness of modification remains possible in separate proceedings under the terms of the court of appeals' decision.

its interpretation of the decree is the correct one" (Pet. App. A9).[8] There is no reason to believe that the government's interpretation will be given special or controlling weight by the court in such a situation. When a consent judgment is being interpreted for enforcement purposes, a court must look to the language of the decree and the circumstances surrounding its formation. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 233-236, 238 (1975). Courts may not properly accord special deference to one party's interpretation of the decree. *Id.* at 235-236, citing *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971). See also *United States* v. *Atlantic Refining Co.*, 360 U.S. 19, 23 (1959); *Hughes* v. *United States*, 342 U.S. 353, 357-358 (1952).[9]

The refusal of the courts below to allow petitioners to avoid their agreement is supported by significant considerations of public policy.[10] The willingness of prosecutorial

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[8]Contrary to petitioners' implication (Pet. 16), entry of the decree does not require them to risk contempt sanctions or initiation of enforcement actions to obtain clarification. As the court of appeals noted, petitioners "may seek protection through judicial interpretation or modification of the judgment" (Pet. App. A13). Should a concrete controversy arise, declaratory relief is not precluded. There is accordingly no foundation whatsoever for petitioners' assertion (Pet. 16) that they are being denied due process of law.

[9]Contrary to petitioners' assertion (Pet. 7), the decision of the court of appeals does not conflict with any decision of this Court or of any other court of appeals. In this case, the parties agreed on the language of the decree which was entered by the district court and the government has not repudiated that language (Pet. App. A9). In two of the cases which petitioners cite, one of the parties had not agreed to the language of the decree entered by the courts. See *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964); *United States ex rel. Clark* v. *Gramer*, 418 F. 2d 692 (5th Cir. 1969). In the third case petitioners cite, the record failed to show that infant parties to a decree had been represented by counsel. See *White* v. *Joyce*, 158 U.S. 128, 147-149 (1895).

[10]The legislative history of the APPA reflects Congress' awareness and approval of the standard stipulation for entry of a consent decree,

agencies to settle many antitrust cases rather than litigate them to judgment confers substantial savings on all parties to the process. The settlement process, however, is not cost-free for the government. Negotiation of a consent decree can take considerable time, and the evaluation of and response to public comments required by the APPA requires scarce enforcement resources.[11] To allow defendants to avoid their agreements based on speculative "disagreements" could reduce prosecutorial incentives to settle. See, generally, *Johnson Products Co.* v. *FTC*, 549 F. 2d 35, 38-40 (7th Cir. 1977). There is a significant public interest in promoting the settlement of antitrust litigation. Given the district court's power to interpret and modify a decree to avoid injustice, persons in the position of petitioners bear a heavy burden of showing a repudiation of the decree by the government. Both courts below found petitioners' assertions of repudiation or lack of agreement unpersuasive. There is no need for this Court to reexamine such factual determinations. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

2. Petitioners' contention (Pet. 11-16) that they should be relieved of their consent to the judgment because the government did not file its response to public comments within the time contemplated by the APPA is unsound.

*a.* Petitioners argue that even if, as the courts below found, they did not suffer any specific prejudice, the government's tardiness relieves petitioners of their consent (Pet. 11-13, 15-16). However, as the court of appeals recognized (Pet. App. A7), neither the statutory language nor its

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employed in this case, which provides that the private party is bound by and may not withdraw its consent once it has agreed to the decree. H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 6-7 (1974); S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973).

[11]The negotiations in this case consumed more than eight months.

legislative history makes strict compliance with the APPA time limits a condition to final entry of a decree (*id.* at A7-A8)):

> The structure of the statute and its legislative history indicate that Congress was primarily concerned with allowing sufficient time for comment and response. * * * It would not advance the purpose of the statute to adopt a rule that any failure strictly to meet a time limitation precludes entry of a consent decree.

The APPA was enacted to insure "meaningful public comment" on proposed antitrust consent decrees. *Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3 (1973) ("*Senate Hearings*") (remarks of Sen. Tunney).[12] Congress hoped that, by inviting public criticism and giving the government the opportunity to respond, the relief obtained in antitrust consent decrees would be improved. *Ibid.*; see also S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973). To accomplish that goal, the Act establishes procedures for providing public notice of proposed decrees and for submission and consideration of public comments. 15 U.S.C. 16(b)-(g). A proposed decree must be filed with the Court and published in the Federal Register "at least 60 days prior to the effective date of * * * judgment." 15 U.S.C. 16(b). Public comments and the United States' response to those comments must be published and filed "within such sixty-day period." *Ibid.* The United States may request additional time to receive and consider comments; but the time period "shall not be shortened except * * * upon a showing that (1) extraordinary

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[12]Senator Tunney was a sponsor of the APPA.

circumstances require such shortening and (2) such shortening is not adverse to the public interest." 15 U.S.C. 16(d).[13] Thus, there is clear evidence in the statute of Congress's concern that the time for public comment and the government's response should not be shortened except under "extraordinary circumstances." However there is no comparable indication that Congress felt that the danger of

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[13]It is the government's view that the APPA, 15 U.S.C. 16(b) and (d), does not limit the time for filing the government's response to comments to 60 days from filing of the proposed decree and that a response is timely so long as it is filed sufficiently in advance of consideration of the motion for entry of the judgment to allow the court, and any interested parties participating in the proceedings, to address and consider that response. The response must, of course, be filed within a time which is reasonable in light of the surrounding circumstances. This interpretation is founded upon both the plain language and the legislative history of the APPA. The APPA provides that a proposed decree must be filed in the court and published in the Federal Register "*at least* 60 days prior to the effective date of * * * judgment." 15 U.S.C. 16(b) (emphasis added). During this interval, comments may be filed by interested parties (*ibid.*). Both comments received and the United States' response thereto must be published and filed "within *such* sixty-day period." *Ibid.* (emphasis added). The only other statutory language touching upon the time for filing states that the United States' response shall be filed "[a]t the close of the period during which such comments may be received." 15 U.S.C. 16(d). Because the 60-day period is merely the minimum time allowed between filing and entry for submission and consideration of comments, there is no specified maximum time for filing a response. We note that a maximum time limit upon hearings prior to entry of a consent decree was proposed but was rejected when Congress concluded that such a provision would not serve the public interest. See *Senate Hearings* 108-109, 116, 151.

The district court adopted the government's interpretation of the procedural requirements of the APPA (Pet. App. A26-A27), but the court of appeals disagreed (*id.* at A7), overlooking the fact that the

unduly lengthy government consideration of public comments on proposed consent decrees was so great as to allow defendants to withdraw their consent, absent a showing of prejudice.[14]

*b.* The courts below correctly concluded that petitioners were not prejudiced by the government's filing of its response to the public comments after expiration of the 60-day period (Pet. App. A8, A27). The stipulation entered by the parties called for the consent decree to be entered "at any time after compliance with the requirements of the

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period "within" which the government's response is to be filed is prescribed only as a minimum of 60 days. As described above (page 5, *supra*), however, the court of appeals held that the government's technical noncompliance with the APPA timetable did not deprive the district court of power to enter the decree (Pet. App. A7-A8).

In our view, this question, like the other aspects of the court of appeals' ruling contested by petitioners, warrants no further review. We are unaware of any other decision addressing this point. Moreover, the court of appeals recognized that the government may be entitled to some additional time after close of the comment period for filing its response (Pet. App. A7) and that the government's time may be extended with leave of court (*ibid.*). Accordingly, the court of appeals' decision makes allowances for exigent circumstances and there is no reason to believe that difficulties will arise in the future in this area. See page 13, *infra*.

[14]Petitioners' contentions (Pet. 12-13) to the contrary are unfounded. The language quoted from the House Report (H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 7 (1974)) merely tracks the statutory language. The language petitioners quoted from the Senate Report ("[U]nder no circumstances would the period *required* for the submission of any comments and the government's response be longer than sixty days." S. Rep. No. 93-298, *supra*, at 6 (emphasis substituted) has been misinterpreted. This language evidently means that the United States need not allow more than 60 days for comments and its response. The reading suggested by petitioners is squarely contrary to both the basic statutory provision mandating "at least" 60 days for public consideration (15 U.S.C. 16(b)) and the provision made for extending the comment period upon the government's request (15 U.S.C. 16(d)).

Antitrust Procedures and Penalties Act" (R. 63). As the court of appeals concluded, "[t]he noncompliance did not go to the essence of the stipulation" (Pet. App. A8). At no time while the government awaited the enactment of the EEA Amendments and the Department of Commerce regulations thereunder did petitioners inform the government or the district court that the delay in the government's response threatened to prejudice petitioners or vitiated their consent. Thus, petitioners have merely seized upon a supposed technical deficiency to escape from their agreement (see Pet. App. A8).[15]

*c.* In any event, the timeliness issue raised by petitioners is not likely to be of importance in other cases. The APPA authorizes the government to obtain from the district court an extension of the 60-day period for response to public comments. 15 U.S.C. 16(d). As a result, it is to be expected that when, in the future, the government determines that it

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[15]Petitioners suggest (Pet. 14) that they were prejudiced by the fact that enactment of the EAA Amendments during consideration of comments caused the United States to address comments concerning the amendments in its response. But, as the courts below held, that response in no respect prejudices petitioners. In any event, that suggestion conflicts with petitioners' further suggestion (Pet. 14) that had Congress been fully aware of the position taken by the United States in this case (including, presumably, the government's response to comments), it would have barred enforcement of any terms of the decree stricter than those in the EAA Amendments. The latter assertion is itself untenable, for Congress deliberately chose not to preempt the antitrust laws in enacting the EAA Amendments. See 50 U.S.C. App. (Supp. I) 2403-1a(a)(4); 50 U.S.C. App. (Supp. III) 2407(a)(4); S. Rep. No. 95-104, 95th Cong., 1st Sess. 47 (1977).

Petitioners' contention (Pet. 15-16) that failure to compel strict compliance with the APPA timetable for filing of the government's response denies them due process of law is entirely unfounded, for as the courts below made clear (Pet. App. A9-A10, A19-A26) no right or liability of petitioners has been affected. See *Board of Regents* v. *Roth*, 408 U.S. 564, 569-572 (1972).

will need more time to respond than is allowed under the decision below, it will seek an extension from the district court.

3. Petitioners' contention that the court of appeals misconstrued the Antitrust Procedures and Penalties Act "public interest" standard (Pet. 16-23) does not warrant further review. Petitioners make two specific claims.[16] First, petitioners claim that the district court failed to consider the effect of the EAA Amendments (Pet. 18-23). However, as the court of appeals recognized (Pet. App. A11-A12), the district court considered this claim and expressly rejected petitioners' contention "that the enactment of the 1977 Amendments limits the operation of the antitrust laws and thus requires the pre-entry modification of the Proposed Judgment" (Pet. App. A26). As the district court concluded, Congress intended that the antitrust laws "would in no way be affected by the passage of this legislation" (Pet. App. A26 quoting S. Rep. No. 95-104, 95th Cong., 1st Sess. 47 (1977)). The EAA Amendments expressly provide that "[n]othing in [the EAA] may be construed to supersede or limit the operation of the antitrust * * * laws of the United States." 50 U.S.C. App. (Supp. III) 2407(a)(4); see page 3 note 5, *supra*. Petitioners argue, in effect, that the district court should have overridden Congress' assessment of the

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[16]Petitioners claim, more generally (Pet. 16-18), that the court of appeals disapproved of the standard of review employed by the district court in assessing the public interest under 15 U.S.C. 16(e), but nevertheless affirmed the district court. As petitioners recognize (Pet. 17), the court of appeals observed (Pet. App. A10-A12) that the district court's review was broader than an isolated introductory comment in that court's opinion might have suggested. Plainly, it was proper for the court of appeals to consider the district court's opinion as a whole in determining the adequacy of the lower court's assessment of the public interest. In any event, petitioners apparently do not disagree with the court of appeals' formulation of the proper standard of review (see Pet. 18). Accordingly, no issue of general importance is presented by the petition.

public interest in this regard. Accordingly, the court of appeals properly rejected petitioners' contention (Pet. 22) that the proposed judgment "was already superfluous" because of the preeminence of the EAA.

Petitioners' final claim (Pet. 23)—that the court of appeals held that its dispute with the government's interpretation of the decree was irrelevant to the APPA public interest evaluation—rests on a misreading of the court's opinion. The court of appeals recognized (Pet. App. A11-A12) that the district court had considered this claim, and concluded that petitioners had not shown that the public interest was affected by the alleged ambiguity (*id.* at A12).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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# Petitioner's Reply Brief

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL CORPORATION, BECHTEL INCORPORATED, BECHTEL POWER CORPORATION, BECHTEL INTERNATIONAL, INC. and BECHTEL INTERNATIONAL CORPORATION,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT: | |
| 1. The Government Opposition Fails to Show Why Absence of Consent Does Not Bar Entry of a Consent Decree. The Contrary Decision Below Requires Review | 2 |
| 2. The Opposition Discloses Continuing Conflict Between the Government and the Court of Appeals Regarding Compliance with the APPA, Which Requires Review | 4 |
| 3. The Opposition and Decisions Below Limit the Public Interest Standard of the APPA to the Scope of the Complaint. This Misconstrues the Statute and Requires Review | 5 |
| CONCLUSION | 7 |

## TABLE OF AUTHORITIES

*Cases* Page

*United States* v. *Armour & Co.*, 402 U.S. 673 (1971) ..... 2-3

*United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964) ..... 2

*Statutes and Regulations*

Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1976) ..... 2, 4-7

The Export Administration Amendments of 1977, Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979) .....3-4, 6-7

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No. 81-521

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BECHTEL CORPORATION, BECHTEL INCORPORATED, BECHTEL POWER CORPORATION, BECHTEL INTERNATIONAL, INC. and BECHTEL INTERNATIONAL CORPORATION,
*Petitioners*,[1]

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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The Government Opposition to the Petition ("Opp.") attempts to avoid review by this Court by belittling the significance of the facts and failing to confront the issues raised by petitioners ("Bechtel"). The Opposition simply fails to discuss two of the three compelling reasons for review by this Court presented by the Petition:

> (1) There was no substantive agreement between the parties on the terms of the proposed decree; and Bechtel objected to entry on this ground before the

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[1] Pursuant to Rule 28.1 of the Rules of this Court, petitioners set forth at page ii of their Petition for a Writ of Certiorari in this matter a "listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates" of petitioners.

decree was entered. This conflicts with every reported precedent and violates due process of law.

(2) The decisions of the courts below misconstrue the statutory public interest standard to limit it to the prayer of the complaint and exclude other plainly relevant interests.

The Opposition seeks to avoid the third reason for review, which is that gross disregard of statutory procedural requirements for entry of a consent decree provides grounds for objection by a defendant. The Opposition raises a compelling new ground for review by showing that there is a continuing conflict between the Department of Justice and the court of appeals regarding whether the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h) (1976), imposes *any* time limitations on the Department.

## ARGUMENT

### 1. The Government Opposition Fails to Show Why Absence of Consent Does Not Bar Entry of a Consent Decree. The Contrary Decision Below Requires Review.

This Court has held that a "consent" decree entered without mutual agreement and full consent on the substance of the proposed judgment violates due process. *E.g.*, *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334 (1964); other cases in Pet. 7-8. Yet, that is precisely what happened here. Tacitly acknowledging that such a clear disregard of this Court's holdings would warrant review,[2] the Opposition attempts to shield the judgment

[2] The Opposition purports to differentiate *Ward Baking*, *supra*, on the ground that here Bechtel stipulated to the form of proposed decree language. Opp. 8 n.9. But the Opposition declines to explain why that preliminary procedural step should determine Bechtel's due process rights in the face of major substantive disagreements manifesting lack of consent at the time of entry. In any event, that stipulation was conditioned on full Department compliance with the APPA—a condition that even the court of appeals found was not fulfilled. *See* Pet. 11. As this Court has held, the right to

below from Supreme Court scrutiny by mischaracterizing the facts and argument.

This is not a situation where there is a mere "*possibility* that disagreements between the parties . . . w[ill] *emerge*" or one in which "the parties *might* disagree in some *future* proceeding" (Opp. I, 7 (emphasis added)). Far from being "speculative 'disagreements'" (Opp. 9), the parties' fundamentally conflicting understanding of the proposed decree was real and well-documented prior to entry of the judgment.

The Opposition ignores the crucial dispute about the decree's territorial reach. *See* Pet. 9. (Obviously, any reference to that dispute would undercut the Opposition's strategy of trivializing the parties' disagreements.) Yet, in a case involving international conduct, such a dispute can hardly be labelled "insubstantial" (Opp. 7 n.7).

Similarly, the Opposition ignores the parties' conflicting interpretations of Section VI of the decree. *See* Pet. 9-10. In Bechtel's view, modification in light of the Export Administration Amendments of 1977 ("EAA")[3] is mandatory. The Department's view is that modification is not required because Section VI does not refer to statutes like the EAA.[4] At the time the decree was entered, there was nothing "speculative" about these irreconcilable

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trial is so fundamental that the conditions under which that right is waived "must be respected." *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) and cases cited in Pet. 15-16.

[3] Pub. L. No. 95-52, 91 Stat. 235 (1977), reenacted without substantial change as Section 8 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified at 50 U.S.C. App. §§ 2401 *et seq.* (Supp. III 1979); App. A44-A52.

[4] The Opposition's meaningless concession "that *consideration* of the appropriateness of modification *remains possible* in separate proceedings" (Opp. 7 n.7 (emphasis added)) avoids any reference to Section VI of the decree. Whether or not modification might be "possible" in the absence of Section VI, the dispute was whether Section VI required modification.

interpretations of Section VI. The EAA was already on the books and the Department had announced its view. Nor was the disagreement "insubstantial" or "non-existent" (Opp. 7 n.7), given the Department's assertion that the decree prohibits a plethora of activities that Congress was unwilling to prohibit when it passed the EAA.[5]

The Opposition places the cart before the horse when it argues that any defect in mutual understanding or consent should be cured through post-entry declaratory judgment proceedings. Opp. 8 n.8. Whatever public policy there may be in favor of expeditiously settling lawsuits, there is no warrant under the Constitution to impose a "consent" judgment on a party that does not consent, or to judicially convert a document into a binding consensus when the parties openly disagree as to what that document means.

**2. The Opposition Discloses Continuing Conflict Between the Government and the Court of Appeals Regarding Compliance with the APPA, Which Requires Review.**

The Opposition demonstrates that the issue of timely compliance with APPA-mandated procedures requires this Court's definitive review. The court of appeals held that the Department violated the APPA by not filing the public comments and the Department's response within sixty days after publication of the proposed decree. 648 F.2d at 664; App. A7. Despite this clear holding, the Opposition asserts "[i]t is the government's view that the APPA . . . does not limit the time for filing the government's response to comments to 60 days from filing

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[5] A petition for certiorari is hardly the appropriate place to proffer evidence of concrete situations where the parties' disagreements and the conflict between the decree and the EAA have impacted adversely upon Bechtel's business. After this case is remanded, there will be time enough to satisfy the Department's curiosity (Opp. 7).

of the proposed decree. . . ." Opp. 11 n.13.[6] The Department's affidavit in the district court admits that the Department routinely ignores the 60-day deadline. The Opposition betrays a bizarre conception of what is a reasonable period beyond 60 days when it characterizes a flagrant *twelve month* tardiness as a "failure to strictly observe the time limits" of the APPA and "a supposed technical deficiency." Opp. I, 13. It is incumbent upon this Court to resolve this continuing conflict between the Department and the court of appeals.[7]

**3. The Opposition and Decisions Below Limit the Public Interest Standard of the APPA to the Scope of the Complaint. This Misconstrues the Statute and Requires Review.**

The Opposition demonstrates the importance of this Court construing the scope of the APPA's "public in-

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[6] The Opposition says "it is to be expected that when, in the future, the government determines that it will need more time to respond than is allowed under the decision below, it will seek an extension from the district court." Opp. 13-14. So far as we can tell, there is no basis for this "expect[ation]." As the text accompanying this footnote recites, "[i]t *is* the government's view" that the court of appeals was wrong (emphasis added). Should certiorari be denied in the face of this expressed view, the Department may well feel sufficiently vindicated to continue to disregard the 60-day limit.

[7] If a defendant deprived of its due process right to trial has "no right" to relief from, and suffers "no liability" as a result of, the Department's gross disregard of the APPA deadline (Opp. 13 n.15), we doubt that any party ever will have standing to compel the Department to obey the law. There is no substance to the contention that Bechtel "failed to object seasonably to the government's delay" (Opp. I). Bechtel repeatedly asked the Department for copies of the public's comments, without success. That Bechtel did not petition the district court for immediate relief once the sixty days had passed is understandable. Bechtel had no way of predicting how long the delay would be or whether its consequences would be adverse. Contrary to the impression fostered by the Opposition, Bechtel moved for relief in three days, not "[s]ix weeks later," as soon as it discovered the consequences of the Department's one-year delay. Compare Pet. 4 with Opp. 3.

terest" standard. Antitrust decrees frequently relate to matters that are also the subject of federal legislation and regulation. It is imperative that the lower courts know whether such legislation, or regulation, is relevant to determination of the "public interest" concept embedded in the APPA.

The Opposition argues that Congress itself definitively addressed this question when it said that the EAA should not be construed to "supersede . . . the antitrust . . . laws." Opp. 14. This argument assumes that the antitrust laws and proposed consent decrees are the same thing, which they clearly are not. The decree in this case, for example, is a set of novel rules that have never been agreed or adjudicated to be proper or logical applications of the antitrust laws. Whatever it may have intended about the "antitrust laws," Congress did not deprive the district court of its APPA obligation to determine whether *this proposed decree* is either necessary or appropriate now that we have a comprehensive "legislative response to the Arab boycott" (Opp. 3). *See* Pet. 19-23.

Here the district court's description of its public interest role as limited to determining "whether the relief . . . is adequate to remedy the allegations . . . set out in the Complaint" (App. A18) was hardly "an isolated introductory comment" (Opp. 14 n.16). As an integral part of its concluding remarks, the court reasserted that any lack of harmony between the decree and the EAA "is more appropriately direct[ed] to Congress than to a District Court considering a Proposed Judgment within the strictures of the Antitrust Procedures and Penalties Act" (App. A26). The court of appeals endorsed this parochial perception of the judge's role, holding erroneously, but unmistakably, that "*any* conflict between the EAA and the decree is *not relevant*

to a determination of the public interest." 648 F.2d at 666; App. A12 (emphasis added).[8]

In an area as important as the Court has often declared antitrust to be, a clarification of the statutory public interest standard for consent decrees is an important question which has not been, but should be, settled by this Court.

## CONCLUSION

For the reasons stated here and in the Petition, Bechtel respectfully requests that the writ of certiorari issue.

Respectfully submitted,

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[8] It is completely inaccurate to assert, as the Opposition does, that "petitioners. . . . do not disagree with the court of appeals' formulation of the proper standard of [public interest] review. . . ." Opp. 14 n.16. *See* Pet. 16, 18-23.